84-855

NO.

Office-Supreme Court, U.S.
FILED
NOV 28 1984
STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1984

Shirley Basham, Alice Basham, Shannon Basham and Lester Scott,

Petitioners,

vs.

Commonwealth Of Kentucky,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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10 pp

QUESTION PRESENTED

Whether an individual who has been the subject of a federal wiretap should be afforded the right to question the legality of that wiretap prior to having evidence derived therefrom used against him in Court.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1984

SHIRLEY BASHAM, ALICE BASHAM,
SHANNON BASHAM, and LESTER SCOTT
Petitioners

vs.

COMMONWEALTH OF KENTUCKY

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

Petitioners, Shirley Basham, Alice Basham, Shannon Basham and Lester Scott, respectfully pray that a writ of certiorari be issued to review the judgement and opinion of the Supreme Court of Kentucky which was entered on April 19, 1984.

OPINION BELOW

The opinion of the Supreme Court of Kentucky is reported as **Basham v. Commonwealth of Kentucky**, KY., 675 SW 2d 376 (1984), and appears herein as Appendix A.

The rulings of the trial courts on Petitioners' motions

to suppress evidence are not reported and appear herein as Appendices B1, B2 and B3. The order of the Supreme Court of Kentucky of October 4, 1984, denying Petitioners' petition for rehearing is not reported and appears herein as Appendix C.

JURISDICTION

The judgment of the Supreme Court of Kentucky was entered on April 19, 1984. A timely petition of rehearing was denied by the Supreme Court on October 4, 1984. That order appears as Appendix C. This petition is filed within sixty (60) days from that date. This court's jurisdiction is invoked pursuant to 28 U.S.C. §1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall be issued, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATUTE INVOLVED

At issue in this case is the interpretation and application of 18 U.S.C. §2510, 2511, 2516, 2517, 2518 and 2519. These statutory provisions are set forth herein verbatim as Appendix D.

STATEMENT OF THE CASE

Early in the year 1981, the Federal Bureau of Investigation and the Kentucky State Police began working in concert on an investigation centering on alleged illegal activities in Warren County, Kentucky. The primary target of this investigation was Shirley Basham. As a part of that investigation, Alexander F. Taft, Jr., United States Attorney, filed an application in the United States District Court for the Western District of Kentucky at Bowling Green seeking an order authorizing interception of telephone conversations on the unlisted phones of Shirley Basham and his wife, Alice Basham. Said application was filed on August 14 and was accompanied by an affidavit of the same date. (T.R., Vol. I, p. 45)[1]. On that date, the Honorable Thomas A. Ballatine, Jr., Judge of the United States District Court, issued an order authorizing interception of wire communications subject to the terms of said order. (T. R., Vol. I, p. 51).

The FBI immediately began eavesdropping on the telephone conversations at the Basham's residence.

Information obtained from this wiretap was turned over to the Kentucky State Police as soon as it was intercepted by the FBI.

On September 27, 1981, Detective Richard Barton of the Kentucky State Police appeared before Warren District Court Judge, Henry J. Potter, and submitted his

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[1]Citations to the record refer to the Clerk's Original Record in the case styled Boyle Circuit Court, Commonwealth of Kentucky vs. Shirley Basham and Alice Basham, Indictment Nos. 82-CR-003, 82-CR-004, 82-CR-007, 82-CR-008, 82-CR-017 & 82-CR-020.

affidavits in support of search warrants for the residences of Shirley and Alice Basham, Shannon Basham and Lester Scott. Those affidavits recite that "on August 14, 1981, at 2:15 p.m., the FBI started listening on the above lines. Subsequently, the FBI informed me of the contents of the wire interceptions" (See Appendix E). These affidavits are based solely upon information supplied by the FBI and KSP Detective Barton. Based only upon evidence gained from a federal wiretap, a search warrant was issued by a state court judge and a search of Shirley and Alice Basham's farm, the Shannon Basham residence and the Lester Scott residence was conducted on September 27, 1981.

In executing the search warrants, the KSP seized numerous items of personal property which were later introduced into evidence at the trial of these Petitioners.

Acting upon evidence obtained as a result of that search, officers of the KSP appeared before the Warren County, Kentucky Grand Jury, and in October of 1981 numerous indictments were returned against the Petitioners charging them with knowingly receiving stolen property, trafficking in drugs and certain other related offenses.

To this date, no federal charges have ever been brought against the Petitioners.

On November 2, 1981, the Petitioners filed a motion to suppress the evidence obtained from the wiretap on grounds that the interception was in violation of Kentucky's anti-wiretap statute and that said wiretap was in violation of Petitioners' Fourth Amendment rights protecting them against unreasonable search and seizure.

(T. R., Vol. I, p. 25). On December 18, 1981, Petitioners filed a renewed motion to suppress and memorandum in support thereof and again raised the issue of the legality of the federal wiretap. (T. R., Vol. I, p. 63).

The first hearing on this matter was held on December 23, 1981, before the Honorable J. David Francis, Judge of the Warren Circuit Court. At this hearing the federal agents were represented by United States Attorney, Alexander Taft. When specific questions were asked concerning the procedural compliance with the federal wiretap statute, the United States Attorney was permitted to object and the court sustained those objections and, thus, effectively prohibited Petitioners from questioning the procedural compliance with the federal statute. (See Appendix B1).

After hearings on Petitioners' motion, the Honorable J. David Francis entered an order on January 4, 1982. (T. R., Vol. I, p. 79; see also App. B2). That order provided that Petitioners' discovery was limited to transcripts of certain specific telephone conversations, the original application filed to obtain the federal wiretap, the affidavit in support thereof, and the federal court order authorizing the wiretap.

Notwithstanding the fact that Petitioners had been denied the right to question procedural compliance with the federal statute, the trial judge found as fact and concluded as a matter of law and gave judgement that "all handled by the federal court and federal authorities was properly done". (See Appendix B2).

By this same order Judge Francis granted the Commonwealth's motion for change of venue and

transferred these cases to the Boyle Circuit Court.

On March 12, 1982, the Petitioners filed a renewed motion to suppress on the grounds that the evidence in question was obtained in violation of Kentucky's anti-wiretap statute and further was obtained in violation of 18 U.S.C. §2510, et. seq. (T. R., Vol. II, p. 167). At the hearing held on the Petitioners' renewed motion to suppress, the Honorable Henry V. Pennington, Judge, Boyle Circuit Court, made it clear that he would not re-consider Judge Francis' January 4, 1982 ruling. Judge Pennington ruled:

"MR. MILLIKEN: Your Honor, the point I would like to make to the Court is that this Court ruled that you were not going to relive Judge Francis' decision.

THE COURT: That's right and I am not because this calf was not in his barn when he licked it."

(Transcript of motions heard April 6, 1981, page 13).

At the hearing on the Petitioners' renewed motion to suppress (as at every stage in the trial court proceeding), the federal agents were represented by a United States Attorney. Again at this hearing, counsel for Petitioners propounded questions to the federal agents attempting to test the legality of the federal wiretap and the procedural compliance with the provisions of 18 U.S.C. §2510, et. seq. As a specific example, when counsel for Petitioners questioned the federal agents about the informants referred to in the affidavit filed in support of the wiretap order, the United States Attorney advised the Court:

"Due to that we would respectfully decline to answer any questions concerning the use of confidential infor-

mants, the names of confidential informants, anything to do with monies paid."

(Transcript of the motions heard April 6, 1984, page 40).

Following the precedent sent by Judge Francis, Judge Pennington refused to permit counsel to question the federal agents regarding their compliance or non-compliance with the federal wiretap statute. Specific examples of the trial court rulings are found at Appendix B3.

This case was tried before a jury in the Boyle Circuit Court. The Petitioners were convicted, and their convictions were based upon the introduction of the tape recorded conversations acquired from the federal wiretap and the physical evidence seized pursuant to the search warrants described hereinabove.

Following entry of judgment, these Petitioners took a direct appeal to the Supreme Court of Kentucky. This case presented an issue of first impression in the Commonwealth of Kentucky insofar as the trial court had permitted the Commonwealth to introduce evidence against these Petitioners, which evidence was derived from a federal wiretap. Kentucky has no enabling statute as required by 18 U.S.C. §2516(2). Rather, the Kentucky legislature adopted a comprehensive anti-eavesdropping statute (KRS, Chapter 526). In the Supreme Court of Kentucky, the Petitioners argued that the evidence obtained from the federal wiretap is inadmissible in a state court prosecution. As a collateral but primary argument on appeal, the Petitioners also argued that should such evidence be deemed admissible in a state court

prosecution, the Commonwealth should be required to afford the Petitioners the safeguards outlined in the federal wiretap statute, 18 U.S.C. §2510, et. seq. The Supreme Court of Kentucky rejected these arguments and affirmed the convictions of these Petitioners.

Following this adverse ruling, Petitioners filed a petition for rehearing in which they again raised the issue of the deprivation of their right to attack the validity of the federal wiretap. (Appellant's petition for rehearing, pp. 1-7). Petitioners' petition for rehearing was denied.

REASON FOR GRANTING THE WRIT

THE SUPREME COURT OF KENTUCKY HELD THAT THE COMMONWEALTH COULD INTRODUCE TAPE RECORDED CONVERSATIONS OBTAINED FROM A FEDERAL WIRETAP WITHOUT AFFORDING THE PETITIONERS THE SAFEGUARDS REQUIRED BY 18 U.S.C. 2518 (10), CONTRARY TO DECISIONS OF THIS COURT.

The question of eavesdropping as an invasion of one's privacy has long been considered troublesome. In **Katz v. United States,** 389 U.S. 347 (1967), the Supreme Court held that officers, although acting with restraint, were not permitted to "search and seize" phone conversations of a party without observing the requisite safeguards including the submission of probable cause to the scrutiny of a neutral magistrate and notifying said magistrate of all that had been seized.

In 1968, Congress enacted the Omnibus Crime Control and Safe Streets Act and as a part thereof enacted legislation permitting wire interception and interception of oral communications. 18 U.S.C. §2510-2520 provides a detailed procedure for obtaining an order of interception and further contains numerous safeguards which Congress felt would protect individuals' Fourth Amendment rights against unreasonable search and seizure.

Following the enactment of 18 U.S.C. 2510-2520, the Supreme Court held in **Gelbard v. United States**, 409 U.S. 41 (1972), that witnesses before a grand jury were entitled to invoke the prohibition of 18 U.S.C. 2515 as a defense to contempt charges and were entitled to all of the safeguards provided for in 18 U.S.C. 2510-2520.

In cases that followed, the Supreme Court held that suppression of wiretap evidence should be granted not only when interceptions violated constitutional rights but also when interceptions violated the procedural requirements of 18 U.S.C. §2510 et. seq. **United States v. Giordano**, 416 U.S. 505 (1974), **United States v. Chevez**, 416 U.S. 562 (1974).

18 U.S.C. 2516(2) provides a procedure for state authorities to obtain a wiretap order. As a prerequisite, the state must have an enabling statute and such enabling statute must be at least as stringent as the federal statute.

Subsequent to the enactment of the federal wiretap statute, the Kentucky Legislature of 1974 enacted legislation dealing with wiretapping. Chapter 526 of the Kentucky Revised Statutes became effective on January 1, 1974, and prohibits wiretapping under Kentucky law. These statutes are summarized as follows:

KRS 525.020 provides in substance that any person who uses any device to eavesdrop is guilty of a felony.

KRS 526.030 provides in substance that any person who installs an eavesdropping device is guilty of a felony.

KRS 526.040 provides in substance that possession of an eavesdropping device is a Class A misdemeanor.

KRS 425.060 provides in substance that any person who uses or divulges information obtained through eavesdropping is guilty of a Class A misdemeanor.

It is apparent from the above that the Kentucky legislature intended to prohibit wiretapping. Thus, the evidence used against these Petitioners can only be admissible in evidence if the procedure used in obtaining such evidence meets the stringent guidelines imposed by 18 U.S.C. §2510 et. seq.

18 U.S.C. 2518(10) provides in substance that an aggrieved person may move to suppress the contents of any intercepted wire or oral communication or evidence derived therefrom on the grounds that (i) the communication was unlawfully intercepted, (ii) the order of authorization or approval under which it was intercepted was not sufficient on its face, or (iii) the interception was not made in conformity with the order of authorization or approval.

18 U.S.C. 2515 provides in substance that any wire or oral communication may not be received in evidence if the disclosure of that information would be in violation of this chapter.

In order to test the legality of the federal wiretap, Petitioners should have been afforded the right to inquire into:

(1) The reliability of the confidential informants referred to in the FBI's affidavit filed in support of the federal court order;

(2) Whether other normal investigation procedures had been exhausted;

(3) Whether the FBI's affidavit had been scrupulously examined by the federal judge;

(4) Whether the five (5) day reports required by the court order had been submitted;

(5) Whether the wiretap was confined to the period of time authorized by the federal court order; and

(6) Whether federal agents divulged information obtained from the wiretap to other individuals in violation of federal statutes.

It is Petitioners' complaint that they were deprived of the federal safeguards afforded by 18 U.S.C. 2510 et. seq. These safeguards are meaningless if aggrieved parties are deprived of their right to discover non-compliance with the federal statute and, thus, that the evidence used to convict them was inadmissible under §2515.

As Justice Douglas noted in his dissent in **Meisel v. United States**, 412 U.S. 954 (1973), "It has become painfully apparent that wiretapping and electronic surveillance are a commonplace tool of those who pursue prosecution with zeal that knows no bounds, not even the clear mandate of our constitution or laws."

Justice Douglas went on to state, "**In Alderman v. United States**, 394 U.S. 165, we held that when the results of electronic surveillance are arguably relevant to the defense, the records must be submitted for adversary hearing before the trial judge. 'Adversary proceedings are a major aspect of our system of criminal justice. Their

superiority as a means for attaining justice in a given case is nowhere more evident than in those cases as the one at bar. . .' "

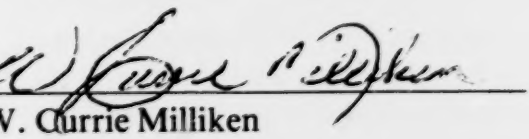
The Supreme Court of Kentucky has in this case established the precedent that wiretapping may be used without judicial restraint in our Commonwealth. If this petition for writ of certiorari is not granted, the citizens of the Commonwealth of Kentucky have no assurance of the protection of their constitutionally guaranteed rights. "Big Brother" will be permitted to eavesdrop without restraint.

CONCLUSION

Based on the facts and circumstances of this case and based upon the foregoing arguments, the Petitioners respectfully pray that a writ of certiorari be issued to review the judgment and opinion of the Supreme Court of Kentucky which was entered on April 19, 1984.

This the 28th day of November, 1984.

Respectfully submitted,



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APPENDIX A

RENDERED: April 19, 1984
TO BE PUBLISHED

Supreme Court of Kentucky

82-SC-689-MR
82-SC-391-TG
82-SC-674-TRG

SHIRLEY BASHAM — APPELLANT

APPEAL FROM BOYLE CIRCUIT COURT
V. HON. HENRY V. PENNINGTON, JUDGE
(Indictment Nos. 82-CR-003, 82-CR-007 and 82-CR-020)

COMMONWEALTH OF KENTUCKY — APPELLEE

AND

ALICE BASHAM and
SHANNON BASHAM — APPELLANTS

APPEAL FROM BOYLE CIRCUIT COURT
V. HON. HENRY V. PENNINGTON, JUDGE
(Indictment Nos. 82-CR-003, 82-CR-004,
82-CR-007, 82-CR-008 and 82-CR-017)

COMMONWEALTH OF KENTUCKY — APPELLEE

AND

LESTER SCOTT — APPELLANT

APPEAL FROM BOYLE CIRCUIT COURT
V. HON. HENRY V. PENNINGTON, JUDGE
(Indictment Nos. 82-CR-005, 82-CR-006 and 82-CR-022)

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION OF THE COURT BY JUSTICE LEIBSON

AFFIRMING

In this case Kentucky State Police and prosecutors have utilized information obtained by federal authorities pursuant to a federal wiretap order both to obtain a search warrant and as trial evidence in state court. The sole issue is whether information thus obtained could be so utilized in light of a state statute prohibiting wiretaps.

Shirley Basham, his wife Alice Basham, his son Shannon Basham, and Lester Scott, have each appealed from judgments of conviction for offenses occuring in Warren County and tried on change of venue in Boyle County, involving multiple charges of knowingly receiving stolen property over one hundred dollars ($100), criminal possession of a forged instrument (counterfeiting), and possession and/or trafficking in controlled substances.

Shirley Basham, who is viewed as the ringleader, has been convicted of fourteen (14) separate charges and received sentences totaling twenty-eight (28) years and twenty-five thousand five hundred dollars ($25,500) in fines.

Alice Basham was convicted of six (6) separate charges and received sentences totaling three (3) years plus six thousand dollars ($6,000) in fines.

Shannon Basham was convicted of three (3) separate charges and received a sentence of one (1) year plus fines totaling five hundred dollars ($500).

A fourth participant in the Bashams' criminal activity, Lester Scott, was convicted of fifteen (15) separate charges involving knowingly receiving stolen property, counterfeiting, and possession of narcotics and controlled substances and received a total of twelve (12) years plus three thousand seven hundred fifty dollars ($3,750) in fines. He makes one claim of error in addition to the challenge against wiretapping. He claims that certain physical evidence used to convict him of knowingly receiving stolen property and counterfeiting was beyond the scope of the warrant and not subject to seizure under the "plain view" doctrine.

These convictions grew out of an extensive criminal investigation centered around the suspected criminal activity of Shirley Basham and his family conducted by the Federal Bureau of Investigation and the Kentucky State Police, acting sometimes independently and sometimes in concert. The convictions were based primarily on evidence obtained as a result of a wiretap operation conducted in Warren County by the F.B.I. pursuant to a Wiretap Order obtained from a United States District Judge on August 14, 1981. This Order authorized the F.B.I. to conduct a wiretap of two telephones at the home of Shirley Ray Basham with certain specified restrictions. Tape recordings from this eavesdropping operation (electronic surveillance) were turned over to Kentucky State Police who used them before trial to obtain warrants for a search producing incriminating evidence. Additionally, state prosecutors used the recordings as primary evidence during the trial.

Both sides state this is an important issue of first impression for our Court. Should we permit evidence obtained in a wiretap operation conducted by federal law enforcement officers to be used in Kentucky courts when we have a state statute making electronic eavesdropping illegal?

On the one hand, even the proponents of a modified form of wiretap would have to admit that wiretapping is at best a "dirty business." See **Olmstead v. United States,** 277 U.S. 438, 48 S. Ct. 564, 72 L. Ed. 944 (1928) (Justice Holmes dissenting). On the other hand, even the opponents of any form of wiretapping would have to be in general agreement with the objectives of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, now codified as 18 U.S.C. §§ 2510-2520, "Wire Interception and Interception of Oral Communications," seeking to help put big time criminals and organized crime out of business.

We must strike a balance between the individual's right to privacy and the public's right to protection.

Initially the United States Supreme Court did not consider a wiretap by law enforcement officers covered by the constitutional protections in the Fourth Amendment. **Olmstead v. United States, supra.** But it has been so regarded since **Berger v. New York,** 388 U.S. 41, 87 S. Ct. 1873, 18 L.Ed. 2d 1040 (1967). Electronic eavesdropping in any form without the prior approval of a judge or magistrate upon a showing of probable cause and under appropriate statutory authorization is now recognized as constitutionally impermissible under the Fourth Amendment. **Katz v. United States,** 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

Title III of the Omnibus Crime Control and Safe Streets Act of 1968, the federal wiretap statute, was enacted to meet the constitutional requirements of the United States Supreme Court decisions preceeding it. [1]The statute permits the Attorney General, or an Assistant Attorney General specifically designated by him, to authorize an investigative or law enforcement officer to apply to a federal judge for authorization to intercept evidence of a long list of federal offenses. 18 U.S.C. §§ 2516 (1) and 2518(1) (a). It also allows the states to pass statutes authorizing interception by state law enforcement officials, after approval of a state judge, in connection with an equally long list of state offenses. 18 U.S.C. § 2516(2). Information obtained by an authorized interception may be used by law enforcement officers in the performance of their duties, and unless otherwise privileged, is admissible in evidence. 18 U.S.C. § 2517 (1), (2), (3), and (4).

Kentucky has not enacted legislation authorizing electronic surveillance by state law enforcement officials. Such an operation by the Kentucky State Police, just as with any other person, is unlawful under the Kentucky statute prohibiting eavesdropping.

KRS Chapter 526, "Eavesdropping and Related Offenses," provides in substance that any person who "intentionally uses any device to eavesdrop," is guilty of a Class D felony, "whether or not he is present at the time." KRS 526.020. It further provides that any person intentionally installing or possessing a device for use in

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[1]Wright, Federal Practice and Procedure: Criminal 2d § 665.1 p. 642-3, compilation of cases upholding constitutionality.

eavesdropping, or divulging information thus illegally obtained, is guilty of a misdemeanor.

No exception is made for police or police activity in KRS Chapter 526. But KRS 503.040(1) provides that "conduct which would otherwise constitute an offense is justifiable when it is required or authorized by a provision of law imposing a public duty or by a judicial decree." "Provision of law" is not confined to provisions of state law. KRS 503.040 further provides:

> " (2) The justification afforded by subsection (1) applies when:
>
> (a) The defendant believes his conduct to be required or authorized by the judgement or direction of a competent court or tribunal or in the lawful execution of legal process. . .

With these statutes in mind we address the threshold question, whether the wiretap was a violation of Kentucky law when authorized by a federal wiretap order. In **United States v. Votteller,** 544 F.2d 1355 (6th Cir., 1976), the Sixth Circuit Court of Appeals affirmed a ruling by the Hon. Howard D. Hermansdorfer, Judge of the District Court for the Eastern District of Kentucky, admitting evidence obtained by federal officers conducting electronic surveillance in Kentucky pursuant to a federal wiretap order. Judge Hermansdorfer concluded that such surveillance was not illegal under the Kentucky eavesdropping statute because "it was justified under the provisions of KRS 503.040." On appellate review the Sixth Circuit affirmed, but thought it unnecessary to its decision to decide if there was a violation of state law. We agree with Judge Hermansdorfer's conclusion that under

KRS 503.040 federal officers conducting an eavesdropping operation pursuant to a valid federal wiretap order are not in violation of state law.

Further, under the doctrine of federal preemption, the Kentucky statute could not make the wiretap activity of the federal officials illegal even had the Kentucky statute so intended. In **United States v. Hall**, 543 F.2d 1229 (9th Cir., 1976), the Ninth Circuit Court of Appeals considered the use in federal court of evidence obtained in California by federal officers where a state statute expressly prohibited use of evidence from a wiretap. The court held that even though federal law does not preclude the states from enacting more restrictive wiretapping statutes of their own, the states cannot make illegal a wiretap conducted pursuant to a valid federal wiretap order.

Thus, if the federal wiretap conformed to the requirements of the Federal Wiretap Statute, the evidence was not obtained illegally and the "exclusionary rule" for suppression of evidence illlegally obtained by police officers or prosecutors by means constitutionally impermissible is not involved. Is there some other statute, rule of law or policy prohibiting use of the evidence? Should use of the wiretap information by Kentucky State Police who were themselves prohibited from conducting such an eavesdropping operation be prohibited because it permits the police to accomplish by indirection what is directly forbidden?

Appellants rely on two cases supporting the view that the state statute should be interpreted as expressing a policy against eavesdropping or wiretapping so pervasive that no exception should be made for evidence obtained under a federal wiretap order and turned over to state

officials. Those cases are **People v. Jones,** 30 Cal.App.3d 852, 106 Cal.Rptr. 749 (1973) and **State v. Williams,** 94 Wash.2d 531, 617 P.2d 1012 (1980).

In **People v. Jones, supra.** the California Court looked at the federal wiretap statute and an **express** provision in the California statute forbidding the use of such evidence and concluded:

> "The California law requiring exclusion of evidence does not conflict with these provisions of the federal law. The protection of privacy afforded by the federal standard has been increased, but in no way have the federal officers' powers to gather information under federal law been diminished by California's refusal to accept information provided by federal officers." 106 Cal. Rptr. at 751.

In **State v. Williams, supra,** the Washington Supreme Court looked at the federal wiretap statute and the state "privacy act" and reached a similar conclusion: "the federal wiretap statute does not preempt the more rigorous Washington privacy act." 617 P.2d at 1017. The Washington decision proceeded from legislative "history" and from that Court's view that the statutory language excluded a wiretap by "any individual."

A contrary result was reached in Pennsylvania in **Commonwealth v. Bennett,** Pa.Super., 369 A.2d 493 (1976). The Pennsylvania court permitted use of information obtained pursuant to a wiretap authorized and conducted in New Jersey to obtain a search warrant in Pennsylvania even though the information could not have been legally obtained under the laws of Pennsylvania:

> "It is not, however, a part of the judicial function to extend and amend the legislation here involved drafting an amendment to that legislation which declares **all** wiretap information and evidence secured thereunder illegal **wherever** and **however** it may be obtained. Had the legislature so intended, it would have been a matter of no difficulty, by the use of a few simple words of English, to so declare it." 369 A.2d at 494. (original emphasis).

The opinion concludes:

> "No useful purpose whatsoever would be served by denying the Commonwealth the use of this information when applying for a search warrant. We would not chastise errant law enforcement agencies or officers and we are not dealing with scoundrels who would use this information to the detriment of our citizens." 369 A.2d at 495.

We recognize the legitimate underpinnings for this controversy, the importance of maintaining our right of privacy against intrusion by electronic surveillance and the universal distaste for surreptitious monitoring of intimate personal communication. But we also recognize that it is for the legislature to strike a balance between these considerations and protecting the public against criminal activity by its discovery and prosecution. It is for the General Assembly, in exercise of its responsibility to express public policy, to decide whether **all** information obtained by electronic surveillance should be suppressed in Kentucky prosecutions even if such surveillance is carried out according to federal law and pursuant to federal court order. We are mindful of our responsibility not to invade the legislature's policy making function in striking the

balance between the right of privacy and the public's right to protection.

In **Nazareth Literary & Benev. Inst. v. Stephenson**, Ky. 503 S.W.2d 177 (1973), we considered a somewhat similar problem. The question was whether the plaintiff in a medical malpractice action could obtain and use as evidence hospital "peer review" records. We held:

> "It is argued that this court should engraft an exception to the procedural rules for discovery that such reports as are sought here must remain confidential because their revelation would impede the freedom of communication between physicians and hospital authorities concerning proper methods of treatment and the corrections of mistakes. Although this might be regarded as an initially appealing argument, on reflection, one might well debate wherein the public interest lies. Claims of privelege are carefully scrutinized, and impediments to the discovery of truth are afforded validity in relatively few instances in the common law." 503 S.W.2d at 178-9.

We concluded that the evidence was obtainable and the question of privilege by public policy addressed itself to the legislature. Subsequently the legislature enacted KRS 311.377 making such records confidential. Here the legislature has the same prerogative. It may extend the statute to exclude all use of evidence obtained by electronic surveillance or eavesdropping, wheresoever and however obtained. But we must resist the impulse to legislate an evidentiary exclusion that the legislation does not itself provide.

The proper position for this Court is expressed in **People v. Fidler**, 72 I11.App.3d 924, 391 N.E.2d 210 (1979). The Illinois court held that evidence seized by federal officers as the result of eavesdropping which conformed to federal constitutional and statutory requirements but not with the Illinois Eavesdropping Statute could be used against the defendant in the state court proceeding. The salient facts in **Fidler** are similar to the present case. Federal officers undertook electronic surveillance pursuant to a federal wiretap order, investigating postal irregularities. Using the information thus obtained the officers obtained a search warrant. The subsequent search revealed no evidence of federal crimes, but did produce evidence of state crimes which the federal officers turned over to state officials for state prosecution. The search was carried out by federal officials rather than state officials as in the present case, but we do not view this distinction as critical. The question is the use of evidence obtained by a federal wiretap in a state prosecution where the state statute would prohibit the use of such evidence if obtained by state officials. The court concluded that such evidence should not be suppressed:

> "(S)ince the actions of the Federal Postal authorities, pursuing a wholly federal investigation, were entirely lawful, and the record contains no hint of collusion between federal and state authorities seeking to avoid the limitations of the Illinois Eavesdropping Statute. The only result of the entry of the suppression order in this case is that it prevents highly probative evidence from being available to the finder of fact in a criminal trial. In our view, the order constituted an unwarranted extension of the exclusionary rule and must be reversed." 391 N.E.2d at 211.

The **Fidler** case strikes the touchstone of the next serious question in this case. The appellants argue, and the Commonwealth conceded for purposes of this case, that if there were no independent, bona fide federal investigation in progress, if there were "collusion between federal and state authorities seeking to avoid the limitations of the (state) statute," **Fidler, supra,** the evidence thus obtained should be suppressed. Further, the Commonwealth concedes the general principle that "evidence illegally seized by officers of one sovereign cannot be utilized by officers of the other sovereign." **Elkins v. United States,** 364 U.S. 206, 80 S.Ct. 1437, 4 L.Ed.2d 1669 (1960), so held and laid to rest the so-called "silver platter" doctrine expressed in **Weeks v. United States,** 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914), which held to the contrary.

Thus the question comes down to deciding what legal defininion should we give to the term "collusion" as it applies to obtaining wiretap evidence in the present circumstances? **Black's Law Dictionary,** 5th Ed., p. 240 defines "collusion" as "an agreement between two or more persons to defraud a person of his rights by the forms of law, or to obtain an object forbidden by law." Applied to the present circumstances, this means that if there were no federal investigation in progress and no reason to believe that a federal offense of the kind authorized for a wiretap investigation by 18 U.S.C. § 2516(1), there would be collusion vitiating the legality of the wiretap investigation and the admissibility of the evidence thus obtained.

Further, if there were proof that the federal officers did not substantially comply with the necessary procedural steps to obtain a federal wiretap order and carry it out, the

evidence resulting from the wiretap should be suppressed. 18 U.S.C. § 2518(10)(a) provides a procedure for "any aggrieved person" to "move to suppress the contents of any wire or oral communication intercepted pursuant to (the act), or evidence derived therefrom, on the grounds that--

(i) the communication was unlawfully intercepted;
(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or
(iii) the interception was not made conformity with the order of authorization or approval."

The Act makes the suppression procedure available "before any court," including state court, where the wiretap information may be utilized.

Thus the appellants were afforded the opportunity to attack the wiretap procedure utilized here by showing that the procedure itself was not in substantial conformity with the federal wiretap statute, or even if the procedure so appeared on its face, by showing that the wiretap was in fact the result of collusion between state officials and federal officials to obtiain evidence for a state court prosecution as opposed to a legitimate federal investigation. Indeed, if there were no legitimate federal investigation in progress, the application for the wiretap order would necessarily fail to comply with the federal wiretap statute.

The evidence in this case was that initially the federal authorities and state authorities each were conducting an investigation of the suspected criminal activity of Shirley Basham, separate from and independent of each other. The federal authorities were investigating Mr. Basham for interstate transportation of stolen property and of

controlled substances; the state authorities for knowingly receiving stolen property and trafficking in narcotics. The federal investigation was older in time and when the federal officers learned of the state investigation it was the federal authorities who first suggested that federal officers and state officers work on this case together.

The federal authorities had made two unsuccessful attempts to obtain an order from federal court to tap the unlisted phones at the Shirley Basham residence before joining their efforts with Kentucky State Police. Thereafter, apparently by their combined efforts, the federal authorities were able to sufficiently document their application to satisfy the federal district judge of the need for and legitimacy of a federal wiretap order. Their procedural difficulties suggest that the federal judge scrupulously took account of the Fourth Amendment considerations underlying the statutory procedure in the federal wiretap statute.

The federal law enforcement officials maintained the wiretap exclusively. State officers were not permitted to listen on any of the earphones, but they were kept advised of what was being heard. This information was then utilized by the state police to secure search warrants which resulted in recovery of stolen property and drugs. Both the physical evidence thus obtained and the tape recordings were used in evidence against these appellants in the present prosecution.

Standing alone, the fact that the federal and state officials worked jointly and concurrently in this investigation is not collusion mandating suppression of the evidence. Both were also acting independently to carry out separate responsibilities investigating federal and state

crimes, respectively. Sharing information and combining their efforts is cooperation, not collusion. The elements of fraud and illicit activity inherent in the term collusion are absent. 18 U.S.C. § 2517 expressly contemplates exchange of information and use of wiretap evidence between federal and state officers on the order of what occurred in this case.

The appellant's motion to suppress encompassed both the tapes of the wiretaps and the physical evidence resulting from the search. The record shows their pretrial motions were given an extensive hearing both in the Warren Circuit Court where the indictment was brought and subsequently in the Boyle Circuit Court where the case was transferred on change of venue. Hon. J. David Francis, Judge, Warren Circuit Court, made extensive written findings covering some twenty-two (22) pages finding that the procedures used for the application and issuance of the warrant were "proper in every way." After additional hearings and sworn testimony before Hon. Henry Pennington, Judge, Boyle Circuit Court, the record shows he reached the same conclusions. Further, the record shows that in both instances appellants were granted adequate discovery, including the right to call and cross-examine state and federal officials, before these rulings were made.

Appellants complain that there are variances between the detailed requirements of the federal wiretap order and the manner in which the wiretap was carried out and the information utilized. We find no authority burdening the **execution** phase of a wiretap operation with hypertechnical requirements. Apparently, as long as there had been a good faith effort and substantial compliance with the terms of the order, there is no reason,

constitutional or otherwise, to suppress the evidence resulting from the wiretap. cf. **Scott v. U.S.**, 436 U.S. 128, 98 S.Ct. 1717, 56 L.Ed.2d 168 (1978) and **United States v. Wolk,** 466 F.2d 1143 (8th Cir., 1972). It is only where the method used to tap the defendant's telephone "deliberately flouted and denigrated statutory provisions designated for protection of the public," that the evidence has been suppressed. **United States v. Eastman, 465 F.2d 1057 (3rd. Cir., 1972).**

In short, appellants have vigorously argued that the wiretap procedure carried out in the present case failed to comply with the statutory mandates of the federal wiretap statute, but the record fails to support these contentions in any way that is material to the manner in which the wiretap information was used. The findings of the trial courts that have considered the issues raised are supported by the evidence. We find no error.

Appellant, Lester Scott, further complains that the trial court erred in overruling his objections to the introduction of certain physical evidence which was discovered in executing the search warrant on his home, but not covered specifically by the warrant. The only element of this claim that merits discussion involves certain guns suspected as stolen property and later indentified by computer check.

Had these articles been plainly identifiable as stolen property their seizure would have been proper under the "plain view" doctrine even though the officers were not aware that such property was on the premises when the search was initiated. **Harris v. United States,** 331 U.S. 145, 154, 67 S.Ct. 1098, 91 L.Ed.2d 1399 (1947); **Baril v. Commonwealth**, Ky., 612 S.W.2d 739 (1981). In **Jones v.**

Commonwealth, Ky., 416 S.W.2d 342 (1967), we stated, "While engaged in a legitimate search under a search warrant describing specific articles, it is proper to seize stolen or contraband property. . .though the items are not described in the warrant." **Id** at 343.

But the complaint here is that the officers could not confirm that the property was stolen or contraband until they ran a check through the National Crime Information Center (NCIC) computer. Appellant Scott cites **United States v. Gray**, 484 F.2d 352 (6th Cir., 1973). On appeal from the United States District Court for the Eastern District of Kentucky, the Sixth Circuit Court of Appeals held that the actions of the state police in removing rifles from the defendant's closets, examining them, and copying down the serial numbers, while carrying out a warrant directed to seizure of alcoholic beverages, could not be justified under the "plain view" doctrine. The court in **Gray** concludes that the police officers' acts in handling the guns, constituted "a seizure." We disagree. The mere act of examining the property in plain view while on a lawful search and copying down serial numbers does not constitute an unreasonable seizure.

The nearest case in point which we find probative of the present issue is **Deberry v. Commonwealth**, Ky., 500 S.W.2d 64 (1973), cert. den., 415 U.S. 918, where the appellant was briefly detained during an investigatory stop so that police officers could obtain information to check the serial numbers on tires on his truck against a record of the serial numbers on stolen tires. We held that "the constitution only prohibits **unreasonable** searches and seizures," and the brief stop involved was not unreasonable in the circumstances. **ID** at 65 (original emphasis). It would be equally **unreasonable** to extend the Fourth

Amendment to prohibit the activities of the police officers in obtaining the serial numbers from property on the premises that appear suspicious and later checking it through a computer. We find nothing inherently unconstitutional in the use of computers to assist a police investigation.

The judgement of the trial court is affirmed.

Aker, Gant, Leibson, Stephenson, Vance, and Wintersheimer, JJ., concur. Stephens, C.J., files a dissenting opinion.

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RENDERED: April 19, 1984
TO BE PUBLISHED

Supreme Court of Kentucky

82-SC-689-MR
82-SC-391-TG
82-SC-674-TRG

SHIRLEY BASHAM — APPELLANT

APPEAL FROM BOYLE CIRCUIT COURT
V. HON. HENRY V. PENNINGTON, JUDGE
(Indictment Nos. 82-CR-003, 82-CR-007 and 82-CR-020)

COMMONWEALTH OF KENTUCKY — APPELLEE

AND

ALICE BASHAM and
SHANNON BASHAM — APPELLANTS

APPEAL FROM BOYLE CIRCUIT COURT
V. HON. HENRY V. PENNINGTON, JUDGE
(Indictment Nos. 82-CR-003, 82-CR-004, 82-CR-007,
82-CR-008 and 82-CR-017)

COMMONWEALTH OF KENTUCKY — APPELLEE

AND

LESTER SCOTT — APPELLANT

APPEAL FROM BOYLE CIRCUIT COURT
V. HON. HENRY V. PENNINGTON, JUDGE
(Indictment Nos. 82-CR-005, 82-CR-006 and 82-CR-022)

COMMONWEALTH OF KENTUCKY APPELLEE

DISSENTING OPINION
BY CHIEF JUSTICE STEPHENS

I respectfully dissent. The Kentucky legislature has clearly expressed its intention in Chapter 526 of the Kentucky Penal Code to disallow what the Court has opened the door for in this opinion. To attempt to reconcile KRS Chapter 526 with the Court's majority opinion here requires the ability to "doublethink." "Doublethink" as George Orwell explained in his classic modern novel, **1984,** ". . .means the power of holding the contradictory beliefs in one's mind simultaneously, and accepting both of them." I do not see how one can hold the mandate of KRS Chapter 526 in one's mind and yet simultaneously accept the eavesdropping evidence in this case.

APPENDIX B1

RULINGS OF THE TRIAL COURT

PORTION OF TRANSCRIPT OF HEARING HELD ON DECEMBER 23, 1981, ON PETITIONERS' MOTIONS TO SUPPRESS.

MR. TAFT: May It Please The Court:

On behalf of the United States--I've been on the verge of entering an objection and instructing this witness not to answer a question, although the question that was asked was answered--but at this moment it has not warranted that. If Mr. Simmons is going to get into the area of what federal violations there are or may be or what federal charges may be pending, I'm going to instruct the witness not to answer that. There is an on-going federal investigation which is not completed at this point in time, and he is not competent to testify as to what charges are going to be levied, if any. It is our position that he is not. .

COURT: Mr. Taft?

MR. TAFT: Yes sir.

COURT: I'm not real of this: but I think you are without standing to make an objection in this matter, this is a State matter and anything, any objection that is going to be made that this Court's going to rule on will be made by the Commonwealth Attorney.

MR. TAFT: I acknowledge that, and I do not object to that proceeding.

COURT: Now, I have no objection, of course, to you sitting over there at the Commonwealth Attorney's table and telling him when to object, but I'm not sure that I'm correct about that because I just haven't run into that thing, but I'm of the opinion and at this time so rule, that any objections to be made in this hearing would have to be made by the Commonwealth Attorney.

MR. TAFT: My capacity here today, Judge, is to represent Mr. Brewer,. .

COURT: Oh, I see, you're here as his attorney?

MR TAFT: Yes sir.

COURT: Well, that throws a little different light on it that I had not thought about.

MR. TAFT: Now, he is limited to the guidelines, and what he did today, testify, and that's what I'm here to advise him on, and when he gets to a. . .

COURT: I understand that. I guess you're right about that and I hadn't really thought about that. . .

MR SIMMONS: Now, if Your Honor please--may I address that for a moment? The subterfuge continues--Mr. Taft has been in constant consultation with Mr. Lowe about the progress in this case, and I suggest to the court that when he tells you that he's just here to represent Mr. Brewer and for no other reason that that is not a true and accurate account of the United States' involvement in this State prosecution.

COURT: You know, Mr. Simmons, let me just tell you

this: it's not unusual for me to hear something in this Courtroom that I just don't swallow hook, line and sinker, and it comes from both sides of the room.

MR. SIMMONS: Okay. That's all the questions I have.

COURT: And sometimes the jury doesn't either.

MR. SIMMONS: I understand.

(T.H., 12/23/81, pp. 33-35)

Thereafter, during the same hearing, counsel for Petitioners, in his first attempt to question the procedural compliance with the wiretap statute asked the following simple question:

Q25 When was this wiretap terminated?

MR. LOWE: Judge, I object on the grounds that it was put in evidence that it was a 30-day application.

MR. MILLIKEN: That's not the question, I know what the order says, I know what the application says, but I think we have a right to know when they ceased to do it.

COURT: Overruled. Now, here's the basis for my ruling on that, Mr. Milliken--

MR. MILLIKEN: It's limited. .

COURT: Your discovery is limited to this lawsuit and I don't want to have to go through 16 counts or 18 counts of State violations here and that's what this lawsuit is about.

Now this lawsuit is not about what that fellow may have done in violation of federal law, or violation of the law in Tennessee, or a violation of the law of Florida, or somewhere else, that they can take him into federal court on, if they have the evidence--this is about knowingly receiving stolen property, counterfeit money, drug charges involved in this--so, what took place after these telephone calls that they turned over to the State fellows on which they got their search warrant and found these goods, they say they did, that's what they got the indictments on, what took place after that would be irrelevant and immaterial.

MR. MILLIKEN: I thought you overrulled the Commonwealth's. .

MR. LOWE: Judge. . .

COURT: Did I say "overruled", I meant to sustain it.

MR. MILLIKEN: Yes sir.

COURT: You can see I did sustain it by my explanation to you--If I said the wrong word, I'm sorry.

MR. MILLIKEN: May I make a comment in that regard, Your Honor?

COURT: I'd be surprised if you didn't.

MR. MILLIKEN: Your Honor, if this federal statute is not complied with, then this is not a legal federal wiretap, and the federal statute provides that any evidence obtained therefrom cannot be admitted into evidence in any kind of a State court proceedings or any other proceedings.

COURT: Now, that's just what I said, too, Mr. Milliken. Mr. Lowe, in this State court proceedings, can't use anything past the telephone calls that he's got here, and the ones that I ordered him to furnish you in the hearing this morning. . .

MR. MILLIKEN: Your Honor, but they have gained the information in order to get this charge as a result of an illegal federal wiretap after the original 30 days, and I think we have a right to know whether that wiretap was extended past the original order and if they gained any information in that period of time which led them to this search warrant and these charges being brought.

COURT: Well, I sustain the Commonwealth's motion. Go ahead.

(T.H., 12/23/81, pp. 39-41)

Counsel then inquired of FBI Agent Brewer:

Q29 Mr. Brewer, is that wiretap still in place?

MR. CAUDILL: Objection, it's not relevant.

COURT: Sustained.

MR. CAUDILL: It's not relevant.

COURT: It has nothing to do with this lawsuit, Mr. Milliken.

MR. MILLIKEN: Your Honor, I have nothing further if the Court won't let me proceed, as far as discovery about . . .

COURT: You just go right ahead, you can ask him any question you want to, if there's an objection I'm going to rule on it, Mr. Milliken.

MR. MILLIKEN: Well, Your Honor, my line of questioning relates to the legality of this federal wiretap.

COURT: You mean as today?

MR. MILLIKEN: As of. . .

COURT: Let me say this: Mr. Lowe or Mr. Caudill, or whoever's prosecuting this, can't use some call that they intercept today in the prosecution of these cases which this man presently stand indicted. You understand that.

MR. MILLIKEN: Your Honor, that's not my point. You know, my client calls me and discusses this case, motions that are pending in this Court, witnesses that we may or may not want to call, this case is a pending, ongoing situation--I can't even, with any amount of freedom, discuss this case with my client over the telephone.

COURT: I imagine that's a little bit of an inconvenience Mr. Milliken, but, that's a problem that I don't really have to face. What I'm concerned with here is the evidence that would be admissible in the trial of Mr. and Mrs. Basham on these 16, 17 charges, and that alone. And I will not permit just a fishing trip, discovery process into anything and everything that doesn't have anything to do with these charges.

MR. MILLIKEN: Your Honor, my last comment in this regard is this: I feel that if that tap has been extended

after the legal court order permitted it, it is being conducted illegally at this time, it taints the entire wiretap and all of the information that the Commonwealth is using in this--the information that they used to obtain this search warrant, everything that they have used and are basing this case on, the result of the search and all is illegal if this is an illegal wiretap proceeding now, which apparently it is by their refusal to answer. And without my being able to discover that, all I can do is ask the Court to note my objection.

COURT: Certianly.

Allright, let's take about a 10 minute recess, ladies and gentlemen.

(T.H., 12/23/81, pp. 41-43)

APPENDIX B2

WARREN CIRCUIT COURT

INDICTMENT NUMBERS 81CR602, 611 DIVISION II

COMMONWEALTH OF KENTUCKY PLAINTIFF

VS.

SHIRLEY BASHAM and
ALICE BASHAM DEFENDANTS

INDICTMENT NUMBERS 81CR609, 610 DIVISION II

COMMONWEALTH OF KENTUCKY PLAINTIFF

FINDINGS, CONCLUSIONS AND
VS. **JUDGEMENT ON:**
(1) DEFENDANTS MOTION FOR ORDER TO PRODUCE: ORDER OVERRULING, (2) DEFENDANTS MOTION TO SUPPRESS: and (3) MOTION TO DISMISS: and GRANTING (4) MOTION OF COMMONWEALTH FOR CHANGE OF VENUE

LESTER SCOTT and GAIL SCOTT DEFENDANTS

INDICTMENT NUMBERS 81CR601, 614 DIVISION II

COMMONWEALTH OF KENTUCKY PLAINTIFF

VS.

SHANNON BASHAM DEFENDANT

The above styled cases have come on for consideration and hopefully a resolution of the following: (1) The defendants' "Motion for Order to Produce" filed on November 2, 1981.
(2) The defendants' "Motion to Suppress".
(3) The defendants' "Motion to Dismiss" filed on December 10.
(4) Motion of the Commonwealth to Change the Venue of the action.

This Court entered an Order on November 18, 1981, entitled "Order Partially Sustaining the Defendants' Motion to Produce", and in that order directed the Commonwealth to furnish the defendants various items which had not been furnished before. However, the Court has become much more conversant with this case partially from research, and partially from the various steps that have been taken in the case since that time, and also recognizes that the affidavit of the FBI agent upon which the Attorney General authorized the application to the Federal Court of the Honorable Thomas Ballentine for a wiretap order, has been placed in the hands of the defendants for their use and preparation of the hearing on these motions, and for other action in the case, and the application itself and Judge Ballentine's order have been filed in the record.

In addition to these items, the transcriptions of the telephone calls which the Commonwealth had advised the Court that it intended to rely on insofar as the trial of this case is concerned have been turned over to the defendants.

Sealed copies of both the affidavit and the telephone calls mentioned in the paragraph above are being filed in the record sealed, and are to be opened only on orders of the Court.

At the hearing on December 23, the defendants moved that the telephone calls referred to in the affidavit for the search warrant be furnished to them, and the Court ORDERED that the following telephone calls also be furnished to the defendants as follows:

On August 14, 1981, call at 7:52, a man called Shirley Basham and the caller was Leonard Casey, (call of August 14, at 7:52 with Billy Ray Buchanon is in middle of call between Leonard Ray Casey and Shirley Basham).
Call on August 18, 1981, at 6:01 p.m., a man identifying himself as Donald Barnes.
On August 19, 1981, at 4:03 p.m., a telephone call between Shirley Basham and Billy Buchannon.
Call on August 21, 1981, at 2:41 p.m., between Shirley Basham and Shannon Basham.
A Call on August 27, at 2:53 p.m., between Shirley Basham and Shannon Basham.
Call on August 27, 1981, 3:53 p.m., (appears in affidavit as September 3, 1981, between Shirley Basham and Shannon Basham.
September 4, 1981, call from Alice Basham to Lester Scott.

The defendants in prior hearings all of which are of record as well as at the hearing on December 23, contended that they were entitled to each and every telephone call that had been made during the process of this wiretap, and during the time that the Commonwealth was putting on its witnesses, they being FBI Agent Bob Brewer and the Kentucky State Policeman Richard Barton sought to cross-examine on other telephone calls at other times.

This Court recognizes that it may be making some change in its order of November 18, 1981, entitled Order

Partially Sustaining Defendant's Motion to Produce, and this Court having made the findings that it has of what has been furnished, HEREBY CONCLUDES and RULES that the Commonwealth has furnished all the items, materials and documents that is necessary for them to furnish, and has completely complied with the intent, and by this change the letter of the order above referred to, and has furnished all the information and documents that the defendants are entitled to have.

Stated another way, it is the opinion of this Court that the defendants are entitled to "discover", that the original wiretap was properly authorized by a Federal Court on a proper affidavit and a proper application and proper order, and once having done so, then they were entitled to any information resulting from that wiretap that would be used against them in trial of the cases now pending in the Warren Circuit Court.

At the hearing the Court tried to make quite clear, that the Commonwealth would be limited to the items that they have furnished the defendants in the way of discovery. In other words, the Commonwealth will not be permitted in trial to go outside any information it may possibly have obtained from other telephone conversations that were received in the wiretap. Other calls may not be used nor anything growing from them may be used in testimony and proof in these cases against these defendants.

And stated again this "Court Hereby Rules" that Motion to Produce by the Defendants has been fully complied with and IT IS SO ORDERED.

The defendants' Motion to Dismiss and Motion to Suppress will next be considered, as some of the same

points are involved herein.

18 USC 2510 et seq., provides for the United States Government to make a wiretap on a telephone of an individual in the process of investigating certain Federal crimes, and in short, the sections of the Code authorize the State to pass similar Legislation, and under the Law this is valid in the event that the State Legislation is no more permissive, but is at least as strong or more restrictive than the Federal Act. The entire **18 USC 2510 through 2520** is under consideration in this opinion.

This Court does not feel that it is necessary for it to pass on whether or not what was done by the Federal Court was proper or not. However, this Court does find that the affidavit submitted to the Department of Justice for the application to the Federal Court was proper, states a probable cause, and meets the requirements of the section of the statute, this being **2518**, and that the application to the Court was proper in every way, and that the Court's order was also proper in every way, and all the telephone calls transcribed which are a part of the case that the Commonwealth has advised this Court intends to rely on, and the information that was gained on which the search warrant was issued all was within the thirty day period of the wiretap authorization, and apparently all of this was properly done within the law, and this Court so finds as a fact, and concludes as a matter of law and gives judgement that all handled by the Federal Court, and the Federal authorities was properly done.

The Kentucky General Assembly enacted **KRS 526**, after the enactment of 18 USC 2510 to 2518, however, and this statute makes it a felony for any person to intercept, or in short, to make a wiretap on a telephone. The statute

is silent on the use as evidence of any wiretapping calls.

In the light of these two statutes the question and problem this Court now has is, whether or not evidence obtained by Federal Officers by wiretap properly authorized by a Fedral Judge is admissible in the Kentucky Court in view of the Kentucky Law, and under the facts of this situation.

This Court knows that in 1976, in the United States District Court for the Western District of Kentucky at Bowling Green, Shirley Basham and others were convicted of numerous counts of the Dyer Act, or Interstate Transportation of Stolen Motor Vehicles, and that he went to the Penitentiary. The exact time of his release is not known by the Court, but of course it could be determined without too much trouble.

In this hearing from the testimony of the FBI Agent Bob Brewer, it is found that he started an investigation of the operations of Shirley Basham in May of 1980, mainly an investigation of Transportation in Interstate Commerce of Stolen Property, and that he sometime later learned of State violations in making this investigation, and when he did so, he gave the information to Kentucky State Police Detective Richard Barton, and that in June of 1981, the FBI and the Kentucky State Police began a joint effort of surveillance on the activities of Shirley Basham and his group of associates. Agent Brewer testified that he was aware in a general way at least, of the provisions of **KRS 526.**, and that the State Officers could not get a wiretap authority.

From the testimony of Detective Barton of the Kentucky State Police, it is found that he began his

investigation in February of 1981, and that according to his records he and Brewer got together in May of 1981, and started their surveillance and investigatory procedures together. Detective Barton is also aware of the State Law of Kentucky under which Kentucky Officers could not get a wiretap authority.

This matter proceded with the officers in surveillance, and making other types of investigatory procedures without much luck, until Agent Brewer filed an affidavit with the Justice Department which culminated with the issuance of the wiretap order. It may not be too important, but he testified that he prepared it the third time, and submitted it before satisfying the Federal authorities in the Justice Department that the case was of the gravity that this extraordinary procedure of the wiretap would be followed.

After the wiretap was in operation both Brewer and Barton testified that as Brewer became aware of State violations that he gave this information to Barton. This is very obvious as it was the information that he gave Detective Barton, that Detective Barton used in making the affidavit before Judge Henry Potter, the District Court Judge who issued the search warrant which resulted in the search, and the findings of a sizeable quantity of guns taken in burglaries in Florida, Oklahoma, Alabama, within the State of Kentucky, and fur coat taken in a burglary in Hart or Barren County one, and a large quantity of drugs that were found in the search.

This Court finds that the entire wiretapping operation was carried on by the Federal authorities, and that State Officers had no role whatsoever in the wiretapping, the listening to calls, but only were told of the State violations

as they appeared.

This Court, from the testimony of Agent Brewer and Detective Barton makes finding of fact that each performed their duties in good faith and in a reasonable belief that their acts were lawful.

The question, therefore, appears to be whether or not the evidence that is obtained by Federal Officers by a wiretap properly authorized by orders of a Federal Judge is admissible in a Kentucky Court, particularly in view of the fact that the State of Kentucky has a law that in itself prohibits a wiretap.

This author has read in addition to the **18 USC 2510 through 2520,** and **Kentucky Revised Statutes Chapter 526,** and most of the annotations under both of those, and has read the following cases: **Rea vs. United States 350 US 214, 100 L Ed 233, 76 Supreme Court 292; Benanti vs United States of America 355 US 96, 2 L ed 2nd 126, 78 Supreme Court 155; Elkins vs United States 364 US 206, 4 L Ed 2nd 1669 80 Supreme Court 1437; the State of Washington vs Williams,** and the **State of Washington vs Caliguri Washington 617 Pacific Reporter 2nd 1012; Commonwealth vs Vitello Mass. 327 NE 2nd 819; People vs. Conklin, Calif. 522 Pacific 2nd 1049; State vs Ayres, New Hampshire, 383 A 2nd 87; State vs McGillcuddy, Fla. App., 342 So. 2nd 567; People vs Fiddler, Ill. 391 NE 2nd 210; People vs Jones, Calif. App., 106 Ca. Rptr 749; Commonwealth vs Bennett, Penn., 369 A 2nd 493; United States vs Votteller 544 F 2nd 1355 (A Kentucky Case);** and **State vs Farha, Kan., 544 Pacific 2nd 341; Chapter 9.73** of the statutes of the State of Washington, the title of which is "Privacy, Violating Right Of," should be read in connection with the **Washington vs Williams case Supra;**

Ill., Code of Criminal Procedure, Section 108A-8, and particular attention is called to **subsection c;** the section of the California statutes which is referred to as **West Annotated Penal Code section 631.** This should be read in connection with the **People of State of California vs Jones Supra; Commonwealth of Kentucky vs Gordon, Kentucky 621 SW 2nd 27; United States vs Forlano, 358 F. Supp. 56; United States vs Hall, 453 F 2d 1229; Richmond vs Commonwealth (80-CA-1366-MR); United States vs Jarbo 428 US 433, 96 Supreme Court 3021 49 L 2nd 1046.**

It is interesting in a case like this to get all the way to the bottom of why Congress enacted the Legislation that they did.

This author found this in the Conklin case Supra, at page 1054 of 522 Pacific 2nd, where it is stated, the Congressional findings to declare in part,

> "in order to protect effectively the privacy of wire and oral communications, to protect the integrity of Court and administrative proceedings, and to prevent the obstruction of Interstate Commerce it is necessary for Congress to define on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized, to prohibit any unauthorized interception of such communications, and the use of the contents thereof in evidence in Courts and Administrative proceedings".

These findings are amplified by the Senate Report.

It states,

> "Title III has as its dual purpose (1) Protecting the privacy of wire and oral communications, and (2) Delineating on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized"

It is also indicated that the "major purpose of Title III is to combat organized crime". Having described the activities of organized crime in gambling, narcotics, loan sharking, and its corruptive effect on our "Democratic Processes", the report concludes that **"authorizing wiretapping and electronic surveillance techniques by law enforcement officials are indispensable legal tools against organized crime".**

It appears from these cases that a State by specific statutory provision of judicially declared policy can preclude from admission in its Courts any evidence obtained by a wiretap, even when the wiretap was made by Federal Officers under a Court order obtained pursuant to **18 USC 2516.** That is because it has been held that the Federal wiretap statutes do not prevent the States from adopting standards for wiretapping that are more strict or stringent than the requirements of the Federal statutes.

However, Kentucky's "Eavesdropping" Statute **KRS 526.010** to **526.080** does not proscribe that evidence obtained by a wiretap is inadmissible in Court. It simply imposes criminal penalties for wiretapping.

Your attention is called to the fact that Illinois, California, and the State of Washington statutes actually provides that the evidence, should it be obtained in violation of the wiretap law, would not be admissible. That Kentucky's law does not so provide, it must be taken that the General Assembly intentionally left that section out, and left it open to the Commonwealth Attorneys to determine whom they would prosecute for a violation of **526** in the eventy it should occur, but would not have to prosecute unless in their discretion they thought it was the thing to do.

It could very well be argued that the General Assembly of Kentucky realizing that Congress had already acted in this field, and were not willing to give this authority to the States Court's recognized that any evidence of State violations found on Federal wiretaps by the FBI could, and would be turned over to the State authorities for State prosecution just as the one here that's under consideration.

The case of **Illinois vs Fiddler Supra,** is probably nearest to the case here under consideration. In that case the Federal Officers under a Federal wiretap secured information concerning this defendant, and obtained a search warrant, conducted the search, and discovered evidence which was later turned over to the State prosecutors, and the State prosecution resulted. The Court there held that the evidence seized by the Federal Officers as a result of the Federal wiretap, and eavesdropping which conformed to the Federal Constitutional and Statutory requirements, but not with the Illinois statute could be used against the defendant in State Court proceedings.

A rather interesting recent case decided by the Kentucky Supreme Court, **Commonwealth of Kentucky vs Gordon, Kentucky 621 SW 2nd 27,** though not involving a wiretap is somewhat similar insofar as the use of evidence is concerned which may be in violation of some other rule of law.

In that case the law provided for a certain disposition to be made of any physical evidence utilized in the investigation of public offenses involving a child. In this particular case among other things used were some photographs, and after that case had been completed this photograph got on a wall of Louisville Police Headquarters, where he was recognized as a perpetrator of a felony. This raised the question of whether the photograph of the juvenile retained in violation of KRS 208.196, which made failure to dispose as required, a Class B misdemeanor, and used as identification of a suspect (then an adult) in a criminal prosecution is a violation of the Fourth Amendment.

The Court held that it was not saying,

> "this statute is clearly for the benefit and for the protection of juveniles. It does not actually or impliedly confer any constitutional rights on the protected parties. It provides a method of enforcement by providing misdemeanor sanctions. In the present case the respondent was an adult when the photograph was viewed and is, therefore, not within the protective aegis of the statute. The statute is a deterrent to specific conduct of police authorities and is not constitutional in nature".

Another case with a similar problem is **United States vs Forlano, 358 F. Supp 56.**

This is a New York case, and New York has a statute authorizing State Court to authorize a wiretap on a proper application, and affidavit very similar to the Federal procedure. In this case the State had a wiretap authority, and permitted the Federal Officers to listen to the tapes of interceptions, and the Federal Court held that this is perfectly permissible.

In this holding the Court said,

> "it is obvious that the statutes by, authorizing law enforcement officials to disclose contents of wire or oral communications to other law enforcement officials or to make other appropriate use of such contents, permit them to turn over tapes of such communications to other law enforcement officers when appropriate to the proper performance of their official duties".

In the case of **United States vs Hall, 453 F. 2d 1229,** which is a case coming from California, and it should be recalled that California has a statute that prohibits not only the State wiretap, but further prohibits the use of evidence gained by a wiretap from being offered.

In this case California officers arrested the defendant based on the use of information gained by wiretaps authorized under the Federal law, and under the authority of the Federal Court.

The Court there held that where information supplied to officers who stopped and searched a car, and a purse

had been obtained from a Federal wiretap duly authorized under Federal statute, heroin and narcotic paraphernalia seized in the course of search were not inadmissible, because the wiretap was in violation of terms of a State statute.

It appears that **18 USC 2517** recognizes the desirability from the public stand point of officers of the Federal government, and the State government cooperating with each other, and exchanging information, and it would be quite ridiculous if this or any other Court required our officers to play a game of, "I've Got a Secret" with each other, but it should be and is a good interworking between State and Federal Officers, and that's the way it should be.

This Court, therefore, holds that the evidence legally and properly obtained by the Federal Officers, and turned over to the State Officers may be used by State Officers in a State prosecution.

However, if it should ultimately be held that the evidence was illegally obtained by the State Officers then, this author and this Court feels that the decision would rest squarely on the "General Exclusionary Rule" under which evidence illegally obtained by law enforcement officers may be suppressed, or may not be suppressed as the case may be.

In order for the "Exclusionary Rule" to be applied in the present case, it first would be necessary for the Court to determine that the evidence was illegally obtained. Two considerations would enter in that determination. The first, whether the Federal wiretap statute section **2516 of 18 USC,** in specifically authorizing wiretaps under a Court Order, preempts state action to the extent that although

evidence so obtained to be admitted in the State Court's, the State would not have the power to treat the action of the Federal Officers as a punishable violation of the Kentucky Statute. In other words, the State would not have the right to say that the evidence produced by the Federal wiretap was illegally obtained so as to invoke "Exclusionary Rule"; the State would have to use some other basis for excluding the evidence. This author does not find any previous Kentucky cases on this subject.

The second consideration arises from **KRS 503.040**, a part of the **General Criminal Code of Kentucky**, which says that,

> "conduct which would otherwise constitute an offense is justifiable when it is authorized by a provision of law imposing a public duty or by a judicial decree",

and that the conduct is justifiable where,

> "the defendant believes his conduct to be authorized by the judgement or direction of a competent court of tribunal---".

The opinion of the Sixth Circuit Court of Appeals in **United States vs Votteller Supra,** notes that in the trial of the case in the District Court, Judge Hermansdorfer held that by reason of **KRS 503.040** a Federal wiretap made pursuant to a Court Order under **2516** was not illegal. That seems to be a reasonable interpretation of **KRS 503.040.**

The Sixth Circuit, however, found it necessary to decide whether the wiretap in that case was illegal under

Kentucky law, because its opinion was that whether or not the wiretap was illegal under Kentucky law, and the evidence obtained thereby, therefore, would be admissible in a Kentucky Court, the evidence was admissible in Federal Court.

From the foregoing it appears that there are two grounds on which it could be held that the wiretap in this case was not illegal, therefore, the Exclusionary Rule would not apply.

A further ground may exist on which the Exclusionary Rule might be held inapplicable. That ground is found in the opinion of the Kentucky Court of Appeals in **Richmond vs Commonwealth (80-CA-1366-MR)** handed down on July 31, 1981. The opinion was that where the action by which the law enforcement officers obtained evidence was unlawful, the officers took the action in the good faith and reasonable belief that it was lawful, the evidence should not be suppressed.

The rationale of the opinion was, that since the purpose of the Exclusionary Rule is to deter future unlawful police conduct, **United States vs Jarbo 428 US 433, 96 Supreme Court 3021 49 L 2nd 1046,** there's no reason to apply the rule where the officers acted in good faith and reasonable belief that their acts were lawful. In the Richmond case a search might have been considered unlawful because the search warrant was issued by a District Judge for premises outside his District. The Court relied upon a Fifth Circuit decision in which evidence was obtained as result of an illegal arrest, and upon a New York case in which evidence was obtained in the search for which the police reasonably, but mistakenly, believed that they had obtained a valid consent.

Under the rationale of the Richmond opinion it very well could be held that a wiretap made by Federal Officers under the authorization of a Court Order is not the kind of willful or unlawful conduct that needs to be deterred, and therefore, there is no occasion to apply the Exclusionary Rule to the evidence obtained by the Federal wiretap.

After the foregoing opinion was written this author had an opportunity to see a copy of "The Law of Electronic Surveillance", by Honorable James G. Carr. The author of that book was the principal author of the National Wiretapping Commission Report, which was presented to President Gerald Ford and Congress in 1976, on the events and developements attendant upon the implementation of Title III.

This Court is glad to find its judgements confirmed in that treatise Section 7.02 (7) on page 424, and 7.04 beginning on page 433.

For the reasons herein stated this Court finds, concludes and gives judgement that:

1. The evidence obtained by the FBI in the wiretap authorized by the Federal court, and turned over by them to the Kentucky State Police, can be used by the State Officers to obtain a search warrant from the State Court, and evidence found in the search is admissible in a trial in the State Court even though, Kentucky has a statute prohibiting a wiretap.
2. Even though, the evidence may have been illegally obtained, the Exclusionary Rule should not, and will not be applied under the circumstances of this case.

Therefore, it is the Judgement of this Court that the Motions to Dismiss, and Motions to Suppress evidence are HEREBY OVERRULED.

This 4th day of January, 1982.

/s/ J. David Francis
JUDGE, WARREN CIRCUIT COURT
DIVISION II

cc. W. Currie Milliken
Robert D. Simmons
Morris Lowe

ORDER ON MOTION FOR CHANGE OF VENUE

In this case the Commonwealth has filed a Motion for Change of Venue, under the provisions of **KRS 452.220 and 452.230.**

The Commonwealth Attorney gave as one of the reasons for the motion that he had tapes in his possession, or transcriptions of the telephone calls made from the Federal wiretap, that indicated that the Commonwealth was entitled to a Change of Venue under the provisions of the aforementioned statutes.

The Commonwealth furnished the Court seven telephone calls that it intended to rely on, and the Court carefully reviewed these telephone calls, and held a conference with the Attorneys for the defendants, the Honorable W. Currie Milliken and Honorable Robert D. Simmons, at which time the Court permitted the defense

counsel to read the transcriptions of four of the telephone calls, permitted them to make any notes that they wanted to, and said he would have them copied if they insisted on them, which they did not.

The Court informed the defense counsel, that in the other 3 calls, other names were mentioned in conversations between Shirley Basham and Fred Tabor on September 5, 1981; Shirley Basham and Hargraves on September 5, 1981; and Shirley Basham and Don Lewis on September 9, 1981, and that they could get information from Mr. Basham as to what other names that he had mentioned, and that the reason for the Court not giving the defense counsel these transcriptions to read is because the interest of justice would not be served by reading these particular transcripts.

This matter came on for a hearing before the Court on December 23, at which time the Commonwealth introduced as witnesses, Bowling Green Cheif of Police, Gary Raymer, Bowling Green City Police Sgt. Bob Beckham, Lt. Gary Lusher, Director of Criminal Investigation of the Bowling Green Post of the Kentucky State Police, Bowling Green City Police Chief of Detectives Darrell Moody, and FBI Agent Bob Brewer.

From the testimony of these witnesses, this Court finds that both Mr. Basham and Mrs. Basham have large families, and many friends and/or acquaintance, and that it would be very difficult to get a jury in this, or any of the adjoining Counties that would be fair to the Commonwealth in this prosecution.

Lt. Gary Lusher testified, that in a previous prosecution of Shirley Basham for Knowingly Receiving

Stolen Property involving the theft of a tractor, that it took some three days to get the jury, and in excess of 200 jurors were questioned before finally getting the jury which resulted in an acquittal.

Darrell Moody testified, that he had known Shirley Basham from approximately 1963, and that he "intimidates people and buys juries", Mr. Moody admitted that he himself had been intimidated by Mr. Basham, and related in his testimony that a man named Max Bayer testified in a Federal Court proceeding, and in that same week his house was burned down, and on another occasion leading to the trial of Shirley Basham in a car theft ring, that he was involved in the investigation, and that his house was blown up, and that on another occasion approximately in 1968, that Mr. Basham was arrested for car theft, which was dismissed in Court on the next day, whereupon, Mr. Basham demanded an apology from the television station, and upon being refused the next day the television tower was blown up. In the aforementioned explosions there had been no charges or convictions.

Agent Bob Brewer testified from the tapes, and the transcripts which had been furnished to the defendants for their observation, and that in those telephone conversations which were transcribed, that Shirley Basham discussed the fixing of juries, and that 'a fix was needed". While at this time he and the person to whom he was talking were discussing a trial probably to be held in Tennessee, the state of mind of the defendant should, and will be taking into consideration by this Court in its judgement in this matter.

The defendants offered no witnesses on their behalf, insofar as the Change of Venue is concerned.

This Court knows of its own knowledge, and from the written statement, and Motion of the Commonwealth, that Mr. Basham and his wife have sizeable families (the Court knows of its own knowledge that Mrs. Basham was a Miller, and is one of approximately 20 children in her family), that these families are influential in Warren County, and knows further that these families have made contacts with numerous people in behalf of Shirley Basham in this case, and therefore believes these family members and Basham himself will continue to contact people in his behalf, and other people in whom he is interested. The Court finds that there is a good probability that some people in Warren County may be intimidated by Mr. Basham and his associates, and therefore, this Court finds from the statement of the Commonwealth Attorney and its own knowledge that the officers of the Court may be prevented from discharging their duty or jurors may be intimidated or deterred from fairly, and impartially rendering a verdict in this case. THEREFORE, a Change of Venue is HEREBY GRANTED to the Commonwealth.

The Venue of these cases is HEREBY TRANSFERRED to Boyle County Circuit Court.

This 4th day of January, 1982.

/s/ J. David Francis
JUDGE, WARREN CIRCUIT COURT
DIVISION II

APPENDIX B3

RULINGS OF THE TRIAL COURT

PORTION OF TRANSCRIPT OF HEARING HELD BEFORE THE TRIAL COURT ON APRIL 6, 1982 ON PETITIONER'S RENEWED MOTIONS TO SUPPRESS

MR. MILLIKEN: Your Honor, it's not in this court. We are saddled here with a federal statute which the court has ruled because of that federal statute. The state agency is able to introduce information obtained by federal authorities under that federal statute.

THE COURT: Correct.

MR. MILLIKEN: That federal statute has some certain safeguards--

THE COURT: I understand that.

MR. MILLIKEN: --that are built into it. If we're saddled with the responsibility of it we are therefore, can claim the privilege of those safeguards.

THE COURT: Mr. Milliken, that indeed is true.

MR. MILLIKEN: Thank you.

THE COURT: And I don't seem to think anything to the contrary, however, the Commonwealth Attorney has said that none of the 87 wiretaps that we have here were obtained before or after the federal court order allowing those to be had; is that the statement of the Commonwealth?

MR. LEWIS: Yes, sir.

MR. MILLIKEN: Which is immaterial because there is a specific federal statute that says if any of the provisions of the order are violated then the evidence thus obtained, all of the evidence obtained during the original 30 days and any subsequent evidence is inadmissible in any proceedings in any state court municipality and it lists everybody and his brother that you can't admit your testimony into.

THE COURT: Of course now, you come to the cross-road between the federal government and the state government and I'M NOT IN A POSITION TO ORDER THE UNITED STATES ATTORNEY TO ORDER HER CLIENTS, THE FBI TO DISCLOSE THE FRUITS OF A FEDERAL INTESTIGATIONS.

MR. MILLIKEN: I'm not asking that.

THE COURT: or ongoing because that pertains to the federal jurisdiction and they are allowed to investigate their individuals and our state is allowed to do that any more than she can come here to court and force a state agent to testify about what they are doing because we could have the Commonwealth Attorney or the Attorney General jumping up and down too.

MR. MILLIKEN: My questions of this witness is was this wiretap extended past the original 30 days authorized.

THE COURT: It's immaterial. If there is not--if in fact the 87 wiretaps that you have right there, the tapes were within the federal court order.

MR. MILLIKEN: Your Honor, I have to respectfully accept (sic) the court's ruling. I think it's very material.

(T.M., 4/6/82, pp. 71-73)

When counsel tried to inquire further into the legality of the federal wiretap, this occurred.

Q17 Where were you physically located when you were listening?

MS. McMURRAY: Your Honor, this is another one of these areas we are going to have to lodge our objection to where he was physically located, any reference to where the tap was or was used or how it was conducted in that sort of physical type manner. We are going to have to respectfully object.

THE COURT: Well, you say it's one of those areas, what does that mean?

MS. McMURRAY: I have no authorization to testify as to where the conversations were monitored, how they were monitored except for the fact of the actual use of the tape system, how we managed to gain the wire other than the order and the taping itself we're not authorized to go into it any further.

MR. LEWIS: Your Honor, the Commonwealth would object also in that it really has no bearing if they were in a semi-trailer truck outside or where it was. I don't know how this investigation was. It's not material.

MS. McMURRAY: It could jeopardize any other investigations now or then being conducted, Your Honor.

THE COURT: Well, you are stating that there is investigations going on now that this might for the purpose of federal investigations that this might interfere with it?

MS. McMURRAY: Well Your Honor, this was our tap, if that's what you mean. I can't go into whether or not there is a current--

THE COURT: I'm asking you whether or not this--the answer to this question might tend to interfere with a federal investigation?

MS. McMURRAY: Yes, yes.

THE COURT: Federal crime?

MS. McMURRAY: Yes, sir.

THE COURT: All right, I'll sustain the objection.

MR. MILLIKEN: Your Honor, for the record I would like to object to the Commonwealth calling a witness and placing that witness on the stand and then permitting that witness to be represented by independent counsel who is not counsel of record of any party involved in this litigation and permitting that witness--that counsel to object on behalf of that witness as far as the answer that they gave. I do not think personally that this young lady has any standing in this court and I don't think that the federal authorities ought to run in this prosecution.

THE COURT: Well, I suggest that the best thing that she can do is to read into the record at this time the statute under which she is proceeding.

MS. McMURRAY: I'll be happy to, Your Honor. I can start with 28 CFR 1626. If the court or other authority declines to stay the effect of the demand in response to a request made in conformance with Section 16.25 pending receipt of instructions or if the court or other authorities rule that the demand must be complied with respect of the instructions not to produce material or disclosed the information sought in accordance with Section 16.24. The employee or former employee upon whom demands has been made shall respectfully decline to comply with the demands, citing the United States C ex rel Touhy v. Ragan, 340 US 462. This would stem from 16.21 et cetera. My authority only goes to certain areas pursuant to the Attorney General and this is one of the areas where we were instructed not to answer if the court asked us to.

THE COURT: All right now. Let's be sure that we understand on the trial of the case there is nothing to prevent you or whomever else the United States Attorney wants to have here to be present in the courtroom and to make yourself available but I have a little problem here with, you know, you standing up in the middle of the trial and instructing the witness not to answer certainly, by this time they should know what they are and are not allowed to answer.

MS. McMURRAY: Well Your Honor, if you would allow me to instruct them to that effect right at this point I would be perfectly willing not to open my mouth again.

THE COURT: I'm talking about the trial of the case.

MS. McMURRAY: Well Your Honor, after this proceeding I will aslo pursuant to my instructions go back to the Attorney General, go through the taped questions

that were asked and ask for further clarifications with regard to saying so that if there is any way we can cease from doing so, we will. Our policy basically stems around cooperation rather than non-cooperation so that we want to do what we can as far as instructing these witnesses verbally in any trial, I will be glad to talk to them and they can conduct themselves accordingly.

THE COURT: Fine. Proceed. Next witness.

MR. MILLIKEN: Your Honor, it bothers me that the federal United States Attorney's Office is still colluding with the Commonwealth in the prosecution of this case and under as I understand the Kentucky Rules of Evidence we are entitled to a wide open cross of the Commonwealth witness on cross examination.

THE COURT: On cross examination on matters that are pertinent and material to this trial.

MR. MILLIKEN: And I will ask my question again.

Q18 Where were you conducting this listening that you were doing?

MR. LEWIS: I object, Your Honor on the same grounds.

MR. MILLIKEN: On the same grounds this young lady has?

MR LEWIS: It's not relevant or material if they were in a truck or if they were in a house next door or they are with this--

THE COURT: Give me the rationale behind your question Mr. Milliken, as to how it could be material?

MR. MILLIKEN: I want to know where he was and who was there and if I find out where he was I might be able to uncover who else might have been present.

THE COURT: Why don't you ask him who else was present.

MR. MILLIKEN: That's going to be my next question.

THE COURT: Well, I'll sustain the objection to your first one and let you make your second one.

MR. MILLIKEN: I would like to be able to verify some of this information, I've obtained today, Your Honor. That's the reason I'm asking these other questions, Your Honor.

THE COURT: I do not feel that it's permissible for (inaudible) is a better term for the state to force an agent of the federal government to disclose information which will apply to a federal court proceeding or which this court has no jurisdiction or interest as far as that's concerned.

MR. MILLIKEN: Your Honor, there is no federal court proceeding.

THE COURT: Well, investigation.

MR. MILLIKEN: Well, I mean, all they have to do is say we have an investigation going on therefore, we are going to--

THE COURT: First witness said the whole purpose of the wiretap was in furtherance of a federal investigation and each succeeding agent has said that the exact same thing that the reason that they call the state in is that they need more vehicles, more people, more assistance because they weren't able to conduct this investigation themselves without more hands at the wheel.

(T.M., 4/6/82, pp. 125-130)

APPENDIX C

Supreme Court of Kentucky

82-SC-689-MR

SHIRLEY BASHAM — APPELLANT

APPEAL FROM BOYLE CIRCUIT COURT
V. HON. HENRY V. PENNINGTON, JUDGE
(Indictment Nos. 82-CR-003, 82-CR-007 and 82-CR-020

COMMONWEALTH OF KENTUCKY — APPELLEE

AND 82-SC-391-TG

ALICE BASHAM and
SHANNON BASHAM — APPELLANTS

APPEAL FROM BOYLE CIRCUIT COURT
V. HON. HENRY V. PENNINGTON, JUDGE
(Indictment Nos. 82-CR-003, 82-CR-004
82-CR-007, 82-CR-008 and 82-CR-017)

COMMONWEALTH OF KENTUCKY — APPELLEE

ORDER DENYING PETITION FOR REHEARING

Appellants' petition for rehearing is denied.

All concur.

ENTERED: October 4, 1984.

/s/ Robert F. Stephens
Chief Justice

APPENDIX D

§ 2510. Definitions

As used in this chapter—

(1) "wire communication" means any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign communications;

(2) "oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation;

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.;

(4) "intercept" means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device.

(5) "electronic, mechanical, or other device" means any device or apparatus which can be used to intercept a wire or oral communication other than—

(a) any telephone or telegraph instrument, equipment or facility, or any component thereof, (i) furnished to the

subscriber or user by a communications common carrier in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business; or (ii) being used by a communications common carrier in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties;

(b) a hearing aid or similar device being used to correct subnormal hearing to not better than normal;

(6) "person" means any employee, or agent of the United States or any State or political subdivision thereof, and any individual, partnership, association, joint stock company, trust, or corporation;

(7) "Investigative or law enforcement officer" means any officer of the United States or of a State or political subdivision thereof, who is empowered by law to conduct intestigations of or to make arrests for offenses enumerated in this chapter, and any attorney authorized by law to prosecute or participate in the prosecution of such offenses;

(8) "contents", when used with respect to any wire or oral communication, includes any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication;

(9) "Judge of competent jurisdiction" means—

(a) a judge of a United States district court or a United States court of appeals; and

(b) a judge of any court of general criminal jurisdiction of a State who is authorized by a statute of that State to enter orders authorizing interceptions of wire or oral communications;

(10) "communication common carrier" shall have the same meaning which is given the term "common carrier" by section 153(h) of title 47 of the United States Code; and

(11) "aggrieved person" means a person who was a party to any intercepted wire or oral communication or person against whom the interception was directed.

§ 2511 Interception and disclosure of wire or oral communications prohibited

(1) Except as otherwise specifically provided in this chapter any person who—

(a) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication;

(b) willfully uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when—

(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

(ii) such device transmits communications by radio, or interferes with the transmission of such communication; or

(iii) such person knows, or has reason to know, that such device or any component thereof has been sent through the mail or transported in interstate or foreign commerce; or

(iv) such use or endeavor to use (A) takes place on the premises of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or (B) obtains or is for the purpose of obtaining information relating to the operations of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or

(v) such person acts in the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States;

(c) willfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection; or

(d) willfully uses, or endeavors to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection;

shall be fined not more than $10,000 or imprisoned not more than five years or both.

(2) (a) It shall not be unlawful under this chapter for an

operator of a switchboard, or an officer, employee, or agent of any communication common carrier, whose facilities are used in the transmission of a wire communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the carrier of such communication: *Provided*, That said communication common carriers shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

(2)(a)(i) It shall not be unlawful under this chapter for an operator of a switchboard, or an officer, employee, or agent of any communication common carrier whose facilities are used in the transmission of a wire communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the carrier of such communication: *Provided,* That said communication common carriers shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

(ii) Notwithstanding any other law, communication common carriers, their officers, employees, and agents, landlords, custodians, or other persons, are authorized to provide information, facilities, or technical assistance to persons authorized by law to intercept wire or oral communications or to conduct electronic surveillance, as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978, if the common carrier, its officers, employees, or agents, landlord, custodian, or other specified person, has been provided with—

(A) a court order directing such assistance signed by the authorizing judge, or

(B) a certification in writing by a person specified in section 2518(7) of this title or the Attorney General of the United States that no warrant or court order is required by law, that all statutory requirements have been met, and that the specified assistance is required.

setting forth the period of time during which the provision of the information, facilities, or technical assistance is authorized and specifying the information, facilities, or technical assistance required. No communication common carrier, officer, employee, or agent thereof, or landlord, custodian, or other specified person shall disclose the existence of any interception or surveillance or the device used to accomplish the interception or surveillance with respect to which the person has been furnished an order or certification under this subparagraph, except as may otherwise be required by legal process and then only after prior notification to the Attorney General or to the principal prosecuting attorney of a State or any political subdivision of a State, as may be appropriate. Any violation of this subparagraph by a communication common carrier or an officer, employee, or agent thereof, shall render the carrier liable for the civil damages provided for in section 2520. No cause of action shall lie in any court against any communication common carrier, its officers, employees, or agents, landlord, custodian, or other specified person for providing information, facilities, or assistance in accordance with the terms of an order or certification under this subparagraph.

(b) It shall not be unlawful under this chapter for an officer, or agent of the Federal Communications

Commission, in the normal course of his employment and in discharge of the monitoring responsibilities exercised by the Commission in the enforcement of chapter 5 of title 47 of the United States Code, to intercept a wire communication, or oral communication transmitted by radio, or to disclose or use the information thereby obtained.

(c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

(d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or any other State of for the purpose of committing any other injurious act.

(e) Notwithstanding any other provision of this title or section 605 or 606 of the Communications Act of 1934, it shall not be unlawful for an officer, employee, or agent of the United States in the normal course of his official duty to conduct electronic surveillance, as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978, as authorized by that Act.

(f) Nothing contained in this chapter, or section 605 of

the Communications Act of 1934, shall be deemed to affect the acquisition by the United States Government of foreign intelligence information from international or foreign communications by a means other than electronic surveillance as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978, and procedures in this chapter and the Foreign Intelligence Surveillance Act of 1978 shall be the exclusive means by which electronic surveillance, as defined in section 101 of such Act, and the interception of domestic wire and oral communications may be conducted.

§ 2515. Prohibition of use as evidence of intercepted wire or oral communications

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative, committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

§ 2516. Authorization for interception of wire or oral communications.

(1) The Attorney General, or any Assistant Attorney General specifically designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation,

or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of—

(a) any offense punishable by death or by imprisonment for more than one year under sections 2274 through 2277 of title 42 of the United States Code (relating to the enforcement of the Atomic Energy Act of 1954), or under the following chapters of this title: chapter 37 (relating to espionage), chapter 105 (relating to sabotage), chapter 115 (relating to treason), or chapter 102 (relating to riots);

(b) a violation of section 186 or section 501 (c) of title 29, United States Code (dealing with restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under this title;

(c) any offense which is punishable under the following sections of this title: section 201 (bribery of public officials and witnesses), section 224 (bribery in sporting contests), subsection (d), (e), (f), (g), (h), or (i) of section 844 (unlawful use of explosives), section 1084 (transmission of wagering information), section 1503 (influencing or injuring an officer, juror, or witness generally), section 1510 (obstruction of criminal investigations), section 1511 (obstruction of State or local law enforcement), section 1751 (Presidential assassinations, kidnapping, and assault), section 1951 (interference with commerce by threats of violence), section 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), section 1954 (offer, acceptance, or solitication to influence operations of

employee benefit plan), section 1955 (prohibition of business enterprises of gambling), section 659 (theft from interstate shipment), section 664 (embezzlement from pension and welfare funds), section 2314 and 2315 (interstate transportation of stolen property), section 1963 (violations with respect to racketeer influenced and corrupt organizations) or section 351 (violations with respect to congressional assassination, kidnapping and assault);

(d) any offense involving counterfeiting punishable under section 471, 472, or 473 of this title;

(e) any offense involving fraud connected with a case under title 11 or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States;

(f) any offense including extortionate credit transactions under sections 892, 893, or 894 of this title; or

(g) any conspiracy to commit any of the foregoing offenses.

(2) The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter and with the applicable State statute an order authorizing, or approving the interception of wire or oral communications by

investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses.

§ 2517. Authorization for disclosure and use of intercepted wire or oral communications.

(1) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.

(2) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication or evidence derived therefrom may use such contents to the extent such use is appropriate to the proper performance of his official duties.

(3) Any person who has received, by any means authorized by this chapter, any information concerning a wire or oral communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that communica-

tion or such derivative evidence while giving testimony under oath or affirmation in any proceeding held under the authority of the United States or of any State or political subdivision thereof.

(4) No otherwise privileged wire or oral communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character.

(5) When an investigative or law enforcement officer, while engaged in intercepting wire or oral communications in the manner authorized herein, intercepts wire or oral communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subsections (1) and (2) of this section. Such contents and any evidence derived therefrom may be used under subsection (3) of this section when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter. Such application shall be made as soon as practicable.

§ 2518. Procedure for interception of wire or oral communications.

(1) Each application for an order authorizing or approving the interception of a wire or oral communication under this chapter shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(a) the identity of the investigative or law enforce ment officer making the application, and the officer authorizing the application;

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to beleive that additional communications of the same type will occur thereafter;

(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving

any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

(2) The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral com-

munications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

(4) Each order authorizing or approving the interception of any wire or oral communication under this chapter shall specify—

(a) the identity of the person, if known, whose communications are to be intercepted;

(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

An order authorizing the interception of a wire or oral communication under this chapter shall, upon request of the applicant, direct that a communication common carrier, landlord, custodian or other person shall furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the

interception unobtrusively and with a minimum of interference with the services that such carrier, landlord, custodian, or person is according the person whose communications are to be intercepted. Any communication common carrier, landlord, custodian or other person furnishing such facilities or technical assistance shall be compensated therefor by the applicant at the prevailing rates.

(5) No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days.

(6) Whenever an order authorizing interception is entered pursuant to this chapter, the order may require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the judge may require.

(7) Notwithstanding any other provision of this chapter, any investigative or law enforcement officer, specially designated by the Attorney General or by the principal prosecuting attorney of any State or subdivision thereof acting pursuant to a statute of that State, who reasonably determines that—

(a) an emergency situation exists with respect to conspiratorial activities threatening the national security interest or to conspiratorial activities characteristic of organized crime that requires a wire or oral communication to be intercepted before an order authorizing such interception can with due diligence be obtained, and

(b) there are grounds upon which an order could be entered under this chapter to authorize such interception,

may intercept such wire or oral communication if an application for an order approving the interception is made in accordance with this section within forty-eight hours after the interception has occurred, or begins to occur. In the absence of an order, such interception shall immediately terminate when the communication sought is obtained or when the application for the order is denied, whichever is earlier. In the event such application for approval is denied, or in any other case where the interception is terminated without an order having been issued, the contents of any wire or oral communication intercepted shall be treated as having been obtained in violation of this chapter, and an inventory shall be served as provided for in subsection (d) of this section on the person named in the application.

(8) (a) The contents of any wire or oral communication intercepted by any means authorized by this chapter shall,

if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of section 2517.

(b) Applications made and orders granted under this chapter shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. Such applications and orders shall be disclosed only upon a showing of good cause before a judge of competent jurisdiction and shall not be destroyed except on order of issuing or denying judge, and in any event shall be kept for ten years.

(c) Any violation of the provisions of this subsection may be punished as contempt of the issuing or denying judge.

(d) Within a reasonable time but not later than ninety days after the filing of an application for an order of

approval under section 2518(7) (b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of—

(1) the fact of the entry of the order or the application;

(2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application, and

(3) the fact that during the period wire or oral communications were or were not intercepted.

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge of competent jurisdiction the serving of the inventory required by this subsection may be postponed.

(9) The contents of any wire or oral communication intercepted pursuant to this chapter or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception

was authorized or approved. This ten-period may be waived by the judge if he finds that it was not possible to furnish the party with the above information ten days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information.

(10) (a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any wire or oral communication, intercepted pursuant to this chapter or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

(b) In addition to any other right to appeal, the United States shall have the right to appeal from an order granting a motion to suppress made under paragraph (a) of this subsection, or the denial of an application for an order of approval, if the United States attorney shall certify to the judge or other official granting such motion or denying such application that the appeal is not taken for purposes of delay. Such appeal shall be taken within thirty days after the date the order was entered and shall be diligently prosecuted.

§ 2519. Reports concerning intercepted wire or oral communications.

(1) Within thirty days after the explanation of an order (or each extension thereof) entered under section 2518, or the denial of an order approving an interception, the issuing or denying judge shall report to the Administrative Office of the United States Courts—

(a) the fact that an order or extension was applied for;

(b) the kind of order or extension applied for;

(c) the fact that the order or extension was granted as applied for, was modified, or was denied;

(d) the period of interceptions authorized by the order, and the number and duration of any extensions of the order;

(e) the offense specified in the order or application, or extension of an order;

(f) the identity of the applying investigative or law enforcement officer and agency making the application and the person authorizing the application; and

(g) the nature of the facilities from which or the place where communications were to be intercepted.

(2) In January of each year the Attorney General, an Assistant Attorney General specially designated by the Attorney General, or the principal prosecuting attorney of a State, or the principal prosecuting attorney for any political subdivision of a State, shall report to the Administrative Office of the United States Courts—

(a) the information required by paragraphs (a) through (g) of subsection (1) of this section with respect to each application for an order or extension made during the preceding calendar year;

(b) a general description of the interceptions made under such order or extension, including (i) the approximate nature and frequency of incriminating commucinations intercepted, (ii) the approximate nature and frequency of other communications intercepted, (iii) the approximate number of persons whose communications were intercepted, and (iv) the approximate nature, amount, and cost of the manpower and other resources used in the interceptions;

(c) the number of arrests resulting from interceptions made under such order or extension, and the offenses for which arrests were made;

(d) the number of trials resulting from such interceptions;

(e) the number of motions to suppress made with respect to such interceptions, and the number granted or denied;

(f) the number of convictions resulting from such interceptions and the offenses for which the convictions were obtained and a general assessment of the importance of the interceptions; and

(g) the information required by paragraphs (b) through (f) of this subsection with respect to orders or extensions obtained in a preceding calendar year.

(3) In April of each year the Director of the Administrative Office of the United States Courts shall transmit to the Congress a full and complete report concerning the number of applications for orders authorizing or approving the interception of wire or oral communications pursuant to this chapter and the number of orders and extensions granted or denied pursuant to this chapter during the preceding calendar year. Such report shall include a summary and analysis of the data required to be filed with the Administrative Office by subsections (1) and (2) of this section. The Director of the Administrative Office of the United States Courts is authorized to issue binding regulations dealing with the content and form of the reports required to be filed by subsections (1) and (2) of this section.

APPENDIX E

COMMONWEALTH OF KENTUCKY

COUNTY OF WARREN)
) SS.
STATE OF KENTUCKY)

AFFIDAVIT FOR SEARCH WARRANT

Be it remembered that on this day, before me, the undersigned District Court Judge of Warren County, Kentucky, came **Richard Barton, Detective, K.S.P.** a reputable citizen of the County of Warren, who being by me duly sworn, desposes and says that he has good reason to believe and does believe that the following described personal property, to wit: **controlled substances and/or narcotics and/or evidence of the crime of trafficking in controlled substances** are concealed at or on the premises located at **Route 10, Bowling Green, starting at VFW Post 1298 at the north limits of Bowling Green on KY I85, also, known as the Richardsville Road traveling 3.2 miles to the intersection of Campbell Road, turn left on Campbell Road off KY I85 go between two rock walls and travel .2 miles to intersection. Bear right at intersection and travel 1 mile to a gravel lane. Turn left on gravel lane and travel approximately a half mile to the only residence on the gravel lane** and/or in the vehicles described as: (1) 1977 Chevrolet P.U., brown in color '81 KY CG1-650 (2) 1981 Oldsmobile Cutlass, sauterne/gold in color '81 KY FET-431; (3) 1981 Chevrolet P.U., Fleetside, dark gold/cream in color '81 KY FL8-609; (4) 1981 Chevrolet Caprice, white in color '81 KY FGP-131 and on the persons of Shirley Basham and Alice Basham and being situated in Bowling Green, Warren County, Kentucky, being the

premises of Shirley Basham and Alice Basham.

That his reason for believing that said drugs and/or evidence of trafficking in drugs is at the above describes premise or contained in the automobiles described above which are located at the above described premise is as follows:

The affiant says that on August 14, 1981, the F.B.I. received authorization to intercept wire communications on the telephone of Shirley Basham and Alice Basham; telephone numbers 781-1091 and 781-5637. This authorization was received from Judge Thomas Ballantine; Federal Court in Louisville, KY. On August 14, 1981, at 2:15 P.M. the F.B.I. started listening on the above lines. Subsequently, the F.B.I. informed me of the contents of the wire interceptions. On August 14, at 7:52 P.M. a male caller called Shirley Basham and said he "needed 100". The caller was Bill Ray Buchanon who I knew was a dealer in Narcotics from previous experience. On August 18, 1981, at 6:01 P.M. a call came in for Shirley Basham from a man who identified himself as Donald Barnes. Shirley Basham indicated he (Shirley Basham) had "55 little old fellows that he could make a nickel copies on". On August 19, 1981, Shirley Basham called Billy Buchanon and during the conversation "Pot" was discussed and Buchanon said "what the Pot" and Shirley Basham said, "Yes, when do we get it?" Buchanon said, "It would be next week and a pick-up would not haul it". On August 21, 1981, they called his son Shannon Basham and Shirley Basham told Shannon Basham that he (Shirley) had 1½ lbs. of Columbian Marijuana and Shannon said that he did not need it right then. On August 27th Shannon and Shirley Basham had a conversation discussing drug arrests in Bowling Green. Shannon asked Shirley

Basham if he (Shannon) should leave and go to Nashville, Tennessee, for awhile and Shirley Basham said "Yes" and also said, "When the heat is off" he (Shirley) would call him. On September 3, 1981, Shirley Basham and Shannon Basham had another telephone conversation and discussed hiring a lawyer for someone charged with drug offenses. On September 4, 1981, in the early morning hours a call was made from Alice Basham to Lester Scott wherein Alice Basham told Scott to come over and pick up drugs and other items because some of the boys were in trouble and the heat might be on. From Sept. 4, 1981, until Sept. 12, 1981, the affiant has recieved information from the F.B.I. of similar conversations about drugs at the Basham residence which the affiant believes shows a common sceme and course of conduct on the part of Shirley Basham and Alice Basham designed to traffic in drugs from the Basham residence. On Sept. 10, 1981, Shirley Basham and Shannon Basham discussed a drug deal involving a large amount of money whereby Shirley Basham would be the supplier. Affiant further believes that the above information shows a course of conduct on the part of Shannon Basham who resides at 236 E. 14th Street and Lester Scott who lives on Highway 185. On at least one occasion Shannon told Shirley he (Shannon)

would go to Lester and get some stuff. They were discussing Narcotics when this was said.

/s/ Richard Barton
AFFIANT

SUBSCRIBED AND SWORN to before me by /s/ Richard Barton on this the 27th day of Sept., 1981.

To be served within 12 hours,
From 1:00 o'clock P.M.

/s/ Henry J. Potter, Jr.
JUDGE, WARREN DISTRICT COURT
DIVISION NO. II

Office-Supreme Court, U.S.
FILED
FEB 15 1985
ALEXANDER L. STEVAS,
CLERK

(2)

No. 84-855

SUPREME COURT OF THE UNITED STATES

October Term 1984

MR
MS. SHIRLEY BASHAM,
ALICE BASHAM,
SHANNON BASHAM, and
LESTER SCOTT - - - - - Petitioners

versus

COMMONWEALTH OF KENTUCKY - Respondent

On Petitioners' November 28, 1984 Petition for Writ of Certiorari to the Supreme Court of Kentucky

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COMMONWEALTH'S BRIEF IN OPPOSITION (OR RESPONSE) TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

Respectfully submitted:

HON. DAVID L. ARMSTRONG
Attorney General

HON. ROBERT W. HENSLEY
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Member of the Bar of the Supreme Court of the United States
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(Mr. Hensley for Service of Process. Rule 33.2(a)(7))
Counsel for Respondent

WESTERFIELD-BONTE CO., 618 W. KENTUCKY—P.O. BOX 3281, LOUISVILLE, KY.

BEST AVAILABLE COPY

QUESTION PRESENTED FOR REVIEW

Whether or Not This Court Should Grant Certiorari of a Kentucky Supreme Court Opinion Which Upheld the Right of a State Officer to Utilize Information Obtained by Federal Officers Pursuant to a Lawful Federal Wiretap to Establish Probable Cause for a State Search Warrant When Such State Officer Could Never Have Obtained a Wiretap and, Thus, Never the Information, Since Wiretapping Is Statutorily Unlawful in Kentucky?

LIST OF ALL PARTIES

See caption of the case on the cover; cover prepared in compliance with United States Supreme Court Rule 33.2.

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v.

COMMONWEALTH OF KENTUCKY - - *Respondent*

On Petitioners' November 28, 1984 Petition for Writ of Certiorari to the Supreme Court of Kentucky

COMMONWEALTH'S BRIEF IN OPPOSITION (OR RESPONSE) TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

CITATIONS TO THE OPINIONS AND JUDGMENTS DELIVERED IN THE COURTS BELOW

Pursuant to United States Supreme Court Rule 34.2 the respondent respectfully exercises its right of acquiescence to the citations to the opinions and judgments delivered in the courts below as petitioners have set them out—referencing petitioners' Appendix A, B1, B2 and B3—on pages 1-2 of petitioners' petition.

CONCISE STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOICED.

Since of the three jurisdictional grounds of 28 U.S.C. §1257 subpart (3) thereof seems the most appro-

priate, pursuant to United States Supreme Court Rule 34.2, the respondent respectfully exercises its right of acquiescence to the concise statement of the grounds on which the jurisdiction of this court is invoked as petitioners have set it out on page 2 of petitioners' petition.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS WHICH THE CASE INVOLVES.

Pursuant to United States Supreme Court Rule 34.2, the respondent respectfully exercises its right of acquiescence to the constitutional provisions, treaties, statutes, etc., as petitioners have set them out—referencing petitioners' Appendix D—on page 2 of petitioners' petition.

CONCISE STATEMENT OF THE CASE [FOR RESPONDENT]

Although petitioners may not have intended to impart this idea, petitioners in the opening line of their STATEMENT OF THE CASE on page 3 of their brief state: "[T]he Federal Bureau of Investigation and the Kentucky State Police began working in concert on an investigation centering on alleged illegal activities in Warren County, Kentucky." "In concert" might impart the idea of a joint effort, a cooperative effort, collusion, if you will. Such was not the case at least in view of how the undersigned attorney read the original twenty-one (21) volumes of evidence and at least in how the Kentucky Supreme Court summarized the evidence.

The undersigned attorney for respondent, who practiced the direct appeal in this case, (the affirming opinion of which is the subject of petitioners' petition for certiorari, *Shirley Basham* v. *Commonwealth and Alice Basham and Shannon Basham* v. *Commonwealth and Lester Scott* v. *Commonwealth,* File Nos. 82-SC-689-MR, 82-SC-391-TG, 82-SC-674-TRG) found, from the volumes of evidence, that the two police agencies instituted their criminal investigations of Mr. Shirley Basham independently of one another and without knowledge of the other's efforts. The Commonwealth's Counterstatement of the Case in the direct state appeal by Mr. Shirley Basham was forty-one (41) pages long, *Shirley Basham* v. *Commonwealth,* File No. 82-SC-609-MR, and in those forty-one (41) pages the Commonwealth, by undersigned counsel, sought to convince the Supreme Court of Kentucky of the independence of the investigations since it was felt that independence, at least initially, was crucial, i.e., no intentional collusion, to circumvent Kentucky law forbidding wiretapping. In this endeavor the Commonwealth was successful as shown by the April 19, 1984 opinion of the Supreme Court of Kentucky—which opinion is the object of this petition for certiorari—and respondent would most respectfully quote from pages 13A-13B of that opinion as it is correctly set out in the petitioners' appendix. (Note that in the published opinion, *Shirley Basham* v. *Commonwealth; Alice and Shannon Basham* v. *Commonwealth; Lester Scott* v. *Commonwealth,* Ky., 675 S. W. 2d 376 (1984) Reh. Den. 1984 the quoted pages appear on one page only, page 382):

The evidence in this case was that initially the federal authorities and state authorities each were conducting an investigation of the suspected criminal activity of Shirley Basham, separate from and independent of each other. The federal authorities were investigating Mr. Basham for interstate transportation of stolen property and of controlled substances; the state authorities for knowingly receiving stolen property and trafficking in narcotics. The federal investigation was older in time and when the federal officers learned of the state investigation it was the federal authorities who first suggested that federal officers and state officers work on this case together.

The federal authorities had made two unsuccessful attempts to obtain an order from federal court to tap the unlisted phones at the Shirley Basham residence before joining their efforts with Kentucky State Police. Thereafter, apparently by their combined efforts, the federal authorities were able to sufficiently document their application to satisfy the federal district judge of the need for and legitimacy of a federal wiretap order. Their procedural difficulties suggest that the federal judge scrupulously took account of the Fourth Amendment considerations underlying the statutory procedure in the federal wiretap statute.

The federal law enforcement officials maintained the wiretap exclusively. State officers were not permitted to listen on any of the earphones, but they were kept advised of what was being heard. This information was then utilized by the state police to secure search warrants which resulted in recovery of stolen property and drugs. Both the physical evidence thus obtained and the

tape recordings were used in evidence against these appellants in the present prosecution.

The only other point respondent would make in this counterstatement and this is in view of petitioners' claim of frustration in their inquiries as to the legality of the federal wiretap, is that when the motions were being argued first in the Warren County Kentucky Circuit Court [Bowling Green, Kentucky, southwestern central Kentucky urban community] and then [approximately eighty-six (86) miles northeast] in the Boyle County Kentucky Circuit Court (Danville, Kentucky), there was at least one comment indicating that the federal wiretap had been continued by order of the United States District Court at least beyond its original thirty (30) day limitation. The only reason respondent's counsel can so state, since it is not part of the record as such, is because Hon. Morris Lowe, the Commonwealth's Attorney for the 8th Judicial District of Kentucky [basically Warren County, Bowling Green, Kentucky] of many years experience, commented at TR p. 1 that it was his understanding that a thirty day extension had been granted by the federal court but all the state prosecution would use were materials from the first 30 days [of the wiretap]. Otherwise, as already stated, there is nothing in the record on such an extension from the original thirty (30) days [of the wiretap].

SUMMARY OF ARGUMENT

This Court should deny certiorari to the Kentucky Supreme Court on its April 19, 1984 opinion in

Basham since the Kentucky Supreme Court, upon review of cited authorities by appellant and appellee in that Court, simply adopted the approach of the Pennsylvania Superior Court in *Commonwealth* v. *Bennett,* Pa. Super., 319 A. 2d 493 (1976), i.e., a nonrestrictive interpretation of the applicable statute(s). In *Bennett,* New Jersey law enforcement officers, pursuant to a lawful New Jersey wiretap, obtained information which was used by a Pennsylvania officer to obtain a search warrant against Mr. Bennett in Pennsylvania. Though the wiretap would have been illegal under Pennsylvania law, the Superior Court of Pennsylvania ruled that the information obtained from it could be used by the Pennsylvania officer to obtain the Pennsylvania search warrant since to rule otherwise would amount to an unwarranted extension of the exclusionary rule and, otherwise, the applicable Pennsylvania statute(s) did not categorically declare illegal *all* wiretap information no matter *wherever* and *however* obtained and: "Had the legislature so intended, it would have been a matter of no difficulty, by the use of a few simple words of English, to so declare it." *Bennett* at p. 494. In essence, this is all the Kentucky Supreme Court has said in examining Kentucky's anti-wiretapping statute(s) *vis-a-vis* the lawful federal wiretap and the use of information from it by a Kentucky State Trooper to obtain a Kentucky search warrant.

ARGUMENT

This Court Should Not Grant Certiorari of a Kentucky Supreme Court Opinion Which, Based Upon a Non-restrictive Interpretation of the Kentucky Statute(s) by the Kentucky Supreme Court, Upheld the Right of a Kentucky State Trooper to Obtain a State Search Warrant by Use of Information Supplied by Federal Authorities Which Information Was Obtained by the Federal Authorities Pursuant to a Lawful Federal Wiretap Even Though the Kentucky State Trooper Could Never Have Obtained the Wiretap Under the Kentucky Statutes and, Thus, Never the Information on Which the State Search Warrant Was Based.

The anti-wiretapping or anti-eavesdropping statutes are included by respondent in its appendix. The Kentucky Supreme Court, in reviewing those statutes, has simply followed the approach of the Pennsylvania Superior Court in *Commonwealth* v. *Bennett,* Pa. Super., 369 A. 2d 493 (1976) Pet. for Allowance of Appeal Den. 1977. In *Bennett* the situation presented to the Court there was very similar to that presented the Kentucky Supreme Court in *Basham* with the exception that in *Bennett* the Pennsylvania officer supplied the information to the New Jersey officers which resulted in the initiation by the New Jersey officers of the New Jersey investigation. As already stated by respondent in its **CONCISE STATEMENT OF THE CASE** and as accepted by the Kentucky Supreme Court there was no such initial cooperation by the Kentucky authorities and the federal authorities. Initially each was concluding their own investigation. In *Bennett* the Court stated at page 494.

The information in question was derived through a wiretap legally authorized by the Superior Court of New Jersey pursuant to the provisions of the New Jersey Wiretapping and Electronic Surveillance Control Act.[3] While it is conceded that this information could not have been legally obtained under the laws of this Commonwealth had the wiretap occurred within our boundaries, this fact has no effect on information obtained in a sister state.

It is, of course, obvious that the courts of this Commonwealth have absolutely no power to control the activities of a sister state or to punish conduct occurring within that sister state. The legislature of New Jersey has determined that wiretapping, in appropriate circumstances and for proper cause shown, will be permitted within its borders. Thus, the information involved in the appeal before us was obtained by the New Jersey Police under a legal authorization. A conclusion that denies the exchange of information between law enforcement agencies of our Commonwealth and those of our sister states cannot be justified. The overriding public policy must be to allow such an exchange, for public policy, in the absence of legislative mandate, must favor the interest of the public by fostering its protection through the detection and apprehension of those who persist in defying our laws. This is particularly true in the case of major interstate drug dealers whose activities wreck the lives of so many people in this country today. We certainly must extend to all people the protection of constitutional safeguards, but to extend such protection, on the instant facts, would

> be an unwarranted extension allowing procedure to emerge victorious over justice.
>
> It cannot be denied that the Pennsylvania anti-wiretapping statutes proscribe certain activities and declare illegal the evidence obtained from those specified activities within the borders of this Commonwealth. However, nowhere in these legislative enactments are we able to find, either specifically or by inference, a legislative mandate that extends to the activities before us. The legislature, by the enactment of these statutory proscriptions, has clearly spoken its intention. It is the duty of the courts of this Commonwealth to interpret and enforce that intention. It is not, however, a part of the judicial function to extend and amend the legislation here involved by drafting an amendment to that legislation which declares *all* wiretap information and evidence secured thereunder illegal *wherever* and *however* it may be obtained. Had the legislature so intended, it would have been a matter of no difficulty, by the use of a few simple words of English, to so declare it.
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> 3. N.J.S.A. 2A:156A-1, *et seq.*

Emphasis, Pennsylvania Superior Courts. Thus, since Kentucky has taken the approach of the Pennsylvania Superior Court in *Bennett* and adopted what respondent's counsel has been calling a non-restrictive approach, i.e., since the Kentucky Legislature has not succinctly said otherwise, wiretap information lawfully obtained by one sovereign can be used by Kentucky authorities at least where there is no initial collusion before the two sovereigns, the respondent respectfully suggests that certiorari is inappropriate at this time.

Respondent's counsel also suggests that certiorari would be more appropriate if in view of *Basham* the Kentucky Legislature—which convenes in January 1986—amended KRS Chapter 526 so that not even the type of information that was exchanged here could be used in Kentucky. Such an amendment to Kentucky's anti-eavesdropping, anti-wiretapping statute(s), under the same factual situation as existed in *Basham,* would undoubtedly produce an opposite ruling by the Courts than was so ruled in *Basham* by the Circuit Courts and by the Kentucky Supreme Court. Such ruling would, at least as the undersigned counsel understands, bring the preemption doctrine into play (see Kentucky Supreme Court Justice Leibson's discussion of preemption at *Basham* v. *Commonwealth,* Ky., 675 S. W. 2d 376 at 379 (1984) or page 7A of the petitioners' appendix) and certiorari would be more appropriate as Kentucky law could then have been ruled, in essence, to be at loggerheads with the 1968 Omnibus Crime Control and Safe Streets Act which authorized federal wiretapping under lawfully proscribed conditions. In this regard, respondent's counsel would note that from counsel's review of the Pennsylvania statute books and a careful reading of *Bennett* it appears that the Pennsylvania Legislature, after *Bennett* was rendered, and apparently (speculative though it is for the undersigned) from the urging of VAN der VOORT, Judge, concurring in *Bennett,* see page 497 of the opinion, amended Pennsylvania's anti-wiretap statute(s) (apparently originally very much like Kentucky's) to

allow for wiretapping under very controlled and prescribed conditions.

CONCLUSION

Based upon the foregoing, i.e., respondent's counsel's contention that this petition involves the challenge of an interpretation of a Kentucky law by the highest court of Kentucky—which interpretation in no way invalidated the lawful acts of the federal authorities but instead accommodated them by a non-restrictive statutory construction of the applicable Kentucky statute(s),—this Court should deny the petition for writ of certiorari.

This 15th day of February, 1984.

Respectfully submitted,

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APPENDIX

CHAPTER 526

EAVESDROPPING AND RELATED OFFENSES

526.010 Definition

The following definition applies in this chapter, unless the context otherwise requires:

"Eavesdrop" means to overhear, record, amplify or transmit any part of a wire or oral communication of others without the consent of at least one party thereto by means of any electronic, mechanical or other device.

526.020 Eavesdropping

(1) A person is guilty of eavesdropping when he intentionally uses any device to eavesdrop, whether or not he is present at the time.

(2) Eavesdropping is a Class D felony.

526.030 Installing eavesdropping device

(1) A person is guilty of installing an eavesdropping device when he intentionally installs or places such a device in any place with the knowledge that it is to be used for eavesdropping.

(2) Installing an eavesdropping device is a Class D felony.

526.040 Possession of eavesdropping device

(1) A person is guilty of possession of an eavesdropping device when he possesses any electronic, mechanical or other device designed or commonly used for eavesdropping with intent to use that device to eavesdrop or knowing that another intends to use that device to eavesdrop.

(2) Possession of an eavesdropping device is a Class A misdemeanor.

526.050 Tampering with private communications

(1) A person is guilty of tampering with private communications when knowing that he does not have the consent of the sender or receiver, he unlawfully:

(a) Opens or reads a sealed letter or other sealed private communication; or

(b) Obtains in any manner from an employe, officer or representative of a communications common carrier information with respect to the contents or nature of a communication.

(2) The provisions of this section do not apply to the censoring of sealed letters or sealed communications for security purposes in official detention or penal facilities.

(3) Tampering with private communications is a Class A misdemeanor.

526.060 Divulging illegally obtained information

(1) A person is guilty of divulging illegally obtained information when he knowingly uses or divulges information obtained through eavesdropping or tampering with private communications or learned in the course of employment with a communications common carrier engaged in transmitting the message.

(2) Divulging illegally obtained information is a Class A misdemeanor.

526.070 Eavesdropping; exceptions

A person is not guilty under this chapter when he:

(1) Inadvertently overhears the communication through a regularly installed telephone party line or on a telephone extension but does not divulge it; or

(2) Is an employe of a communications common carrier who, while acting in the course of his employment, intercepts, discloses or uses a communication transmitted

through the facilities of his employer for a purpose which is a necessary incident to the rendition of the service or to the protection of the rights or the property of the carrier of such communication, provided however that communications common carriers shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

526.080 Forfeiture

Any electronic, mechanical or other device designed or commonly used for eavesdropping which is possessed or used in violation of this chapter, is forfeited to the state and shall be disposed of in accordance with KRS 500.090.